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THE
MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED
ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

BY R. S. MORRISON,
OF THE COLORADO BAR.

VOL. I.

CHICAGO:
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PREFACE.

At the first instead of at the last of this preface I desire to acknowledge the faithful and intelligent aid or rather co-operation of Luke Palmer, Esq., of this place, in the selection of the cases printed in this series, and the preparation of the same for publication; to recognize the kindness of those publishers and reporters who have freely allowed the use of their volumes, and to express my thanks for the courtesies received from the Chicago Law Library and the Symes Library, Denver.

This and the ensuing volumes of the set are intended to present not merely the leading, but the bulk or mass of the cases of importance, and not of mere local interest, bearing on the subject-matter of mines or mining, decided in the appellate courts of the several States and in the Federal courts. Also the leading irrigation cases and a large portion of the English mining decisions. Cases reported in *visi prius* or inferior State courts have been in general rejected, as have been most decisions by divided benches.

The majority of the American decisions obviously come from the Pacific slope and those States of the East which contain the most noted mineral deposits, especially Pennsylvania, Michigan, Illinois, Wisconsin, North Carolina and Georgia; but the series contains cases from every State in the Union where a mining case could be found, from the mining Territories, and often from reports and magazines totally inaccessible except in the largest public libraries.

Salines and oil wells are included as strictly mining matters.

The entire opinion is given in every instance with statement of facts as full as that contained in the original report; in no

instance has any portion of the opinion been omitted, so that the points of practice and other points not essential to the case as a mining case, are printed, and the substance indicated in the head notes as completely as in the original volumes, and as fully as the mining points involved. In general the head notes have been revised upon a plan as nearly uniform as the variety in the style of the original reports would admit.

The order of arrangement is, by subjects in alphabetical order. The leading case under each subject, where such a case presented itself, has been printed first, and the others follow chronologically. Where there has been no case which could be fairly designated as leading, or more material than its fellows, they are printed strictly in the order of time as decided.

The last case under each heading is followed by a citation of those decisions bearing on the same topic, found under other headings in the series, as well as to numerous other cases bearing on the subject, but which could not be specifically classed as mining cases. The citations found in the opinions printed have been verified with such closeness that we believe fewer errors will be found in this series than in the original volumes.

R. S. MORRISON,
GEORGETOWN, COLORADO, Nov. 21, 1882.

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MINING REPORTS.

DERRY V. ROSS ET AL.

(5 Colorado, 295. Supreme Court, 1881.)

Cutting ditch enjoined. Repeatedly cutting a mining ditch is a destructive trespass liable to be enjoined in the exercise of the power of a court of equity.

Abandonment, a legal issue. Where abandonment is averred and denied, the issue raised is an issue at law; and where such an issue is framed in an injunction case, final decree should be deferred until such issue be decided in a court of law; but if the parties proceed to trial without objection before the chancellor upon such issue, his decree can not be questioned for want of jurisdiction. The rule that consent can not give jurisdiction, does not apply where the parties and subject-matter are both within the jurisdiction.

Abandonment divests title. The possessory title to a mining claim may be divested by abandonment as well as by gift or sale.

Question of intent. Abandonment is a matter of intention and operates instantaneously.

Desertion equivalent to abandonment. When a miner gives up his claim and goes away from it, without any intention of repossessing it, and regardless of what may become of it, or who may appropriate it, an abandonment takes place, and the property reverts to its original *status* as part of the unoccupied public domain; it is then *publici juris*, and open to location to the first comer. No subsequent sale by the former locator, in such case, after other rights have intervened, will convey any right or title to the grantee.

MILLER & CLOUGH and A. S. WESTON, for appellant.

THOS. MACON; MARKHAM, PATTERSON, THOMAS and CAMPBELL, for appellees.

Appeal from District Court of Lake county.

The opinion states the facts.

BECK, J. A bill was filed in the district court of Lake county, by the appellees, on the 12th day of August, 1876, setting up, that they were in possession of a certain placer mine and ditch, in Willow gulch in that county, which they had taken possession of and appropriated as abandoned property. That the mine was originally located, and the ditch constructed by Wesley Willett, James Willett and Samuel Hammett, in the year 1866, and that these parties had left and abandoned the property in 1872, and allowed it to become in a ruinous condition; that the complainants finding the premises abandoned, had entered into possession, re-located the property, filed their location certificate in the recorder's office of Lake county, put the property in repair, and commenced mining operations; that they continued to work the mine in a profitable manner, using the water flowing through the ditch for the purpose, until defendant, Derry, cut the ditch and diverted the water so as to compel them to suspend mining operations. Complainants entered into possession in August, 1875, and filed their location certificate for record on the 26th day of October following. The allegation in the bill as transcribed into the record is, that they took possession in August, 1876; but other portions of the bill and record, including the answer, show that the true date is August, 1875. The bill alleges that the appellant, Derry, made no use of the water of the ditch, but wantonly and maliciously at different times, cut the ditch, and allowed the water to flow out and run to waste; that he first cut the ditch on June 1st, 1876, and had since repeatedly cut and broken it, and threatened to continue these wrongful acts. It alleged the damages to be irreparable, and the defendant insolvent. The prayer was for a temporary injunction, restraining the defendant from the acts complained of, and that upon a final hearing, the injunction be made perpetual.

The temporary writ was granted, and one year afterwards, August 15, 1877, the appellant filed a demurrer to the bill, and at the same time a motion to dissolve the injunction. The bill was amended, and thereupon appellant filed an answer, setting up title in himself to the ditch and water. Exceptions being made and sustained to the answer, he filed an amended answer, denying the complainants' title to ditch and water, and claiming title in himself by prior appropriation of the water, and by

purchase of the ditch from Wesley Willett, one of the original locators. To the answer a replication was filed, and the cause was then referred to a Master in Chancery to take testimony. Upon filing of the Master's report of testimony, the parties went into a final hearing of the cause upon the merits before the court; the court found the allegations of the bill to be true; that complainants were the owners of the property, and a decree was entered up in their favor, perpetually enjoining the appellees from interfering with the ditch. The principal errors assigned are, that the court did not have jurisdiction to try the cause and pronounce the decree, and that the decree was not warranted by the testimony.

We have no hesitation in saying that the allegations of the bill justified the issuing of the temporary writ of injunction. It is a common practice for courts of equity to assume jurisdiction of a cause of this nature, for the purpose of restraining acts of trespass to mining property and water rights, where the character and extent of the wrongful acts committed render the injury irremediable, or where an action at law would not afford an adequate remedy, by reason of the insolvency of the defendant. 2 Story's Eq. Jur., Secs. 928, 929; *Irwin v. Davidson*, 3 Iredell's Eq. Cases, 311; *United States v. Parrott*, 1 McAllister, C. C. 271; *Atchison v. Peterson*, 20 Wall. 515.

It is urged that the court below, sitting as a court of equity, had no jurisdiction to try the question of title, which was the main issue presented by the pleadings.

It is undoubtedly true that the ownership of the ditch and water was a question of legal right; when this issue was presented, the court might very properly have refused to proceed further until that issue should have been determined in an action at law. No objection, however, appears to have been raised to the jurisdiction, and both parties voluntarily submitted to a trial of this issue before the court. Can the question of jurisdiction be now raised, for the first time, upon this appeal?

The legal maxim, that consent can not confer jurisdiction, is mainly applicable to courts of special and limited powers. The jurisdiction of such courts can not be extended by consent beyond the limit of the powers granted. Consent of parties would not authorize a justice of the peace to issue a writ of

injunction, or to try and sentence a prisoner for the crime of arson or murder. Mr. Sedgwick, in his work upon the Construction of Statutory and Constitutional Law, p. 359, illustrates the proposition in this wise: "Thus, where an appeal is taken in a cause not appealable, or to a court not having jurisdiction, it is not in the power of the parties to confer jurisdiction by waiving all objections."

The maxim applies with equal force to a court of equity, where the subject-matter of the litigation is wholly outside the pale of equity jurisdiction, and can not be brought within it, either incidentally or by the advent of circumstances.

It is the province of courts of equity to take cognizance of matters of account, trust, fraud, accident and mistake. They have concurrent jurisdiction with courts of law, where the latter courts, although courts of general jurisdiction, can not give adequate relief, or, under the actual circumstances of the case, can give no relief at all; and, according to the classification of Mr. Story, and some other authors of works upon equity jurisprudence, they have also auxiliary or supplemental jurisdiction. As remarked in the case of *Miller v. Furse*, Bailey's Ch. R., 181, with very few exceptions there is no question of civil rights in matters of property that may not come within the jurisdiction of a court of equity.

Criminal matters, however, are wholly outside of equity powers, and no consent would confer on such court jurisdiction to try and punish persons for criminal offenses. Here is a palpable defect of jurisdiction, incapable of being cured, and if asserted, would be usurpation, and the proceeding a nullity.

It is not the province of a court of equity to try causes where the relief prayed for is an award of damages, which can only be properly ascertained by the verdict of a jury; nor is it the province of such court to try legal titles. When, therefore, such issues arise in the progress of a cause, if the court does not of its own motion remit the parties to an action at law, it is the privilege of the parties litigant to object to further proceedings in equity, until the legal issues are determined before a proper tribunal. 1 Story's Eq. Jur., Sec. 72; 2 Story's Eq. Jur., Sec. 925*d*; *Carlisle v. Cooper*, 6 C. E. Greene, 576; Gilbert's History and Practice of the Court of Chancery, p. 51.

If the subject-matter of litigation be outside the pale of

equity jurisdiction, and can not possibly be brought within it, the objection to the jurisdiction can be taken at any time; but the rule is, in respect to all other cases, that if a party submit to the jurisdiction without objection until the decree is entered, he has waived the question of jurisdiction, and can not raise it in the appellate court. *McDonald v. Crockett*, 2 McCord Ch., 135; *Ludlow v. Simond*, 2 Caines' Cases, p. 37; *Burroughs v. McNeill* 2 Devereux & Bat. Eq., 297; *Leroy v. Platt*, 4 Paige's Ch., 77; *Miller v. Furse*, Bailey's Ch., 181.

In the case at bar the subject-matter of the litigation was within the jurisdiction of the court. Upon the face of the bill the court might properly have entered a decree perpetually enjoining the defendant from committing the acts complained of, and until the filing of the answer no purely legal issue arose. By submitting that issue to the court, the appellant has waived the question of jurisdiction, and can not now raise it. And since there was no palpable defect of jurisdiction, the error, if any, is cured.

In respect to the ruling of the court in sustaining the exceptions to the original answer of the defendant, we fail to see that defendant was deprived of any substantial right by this ruling. The same matters of defense were set up by him in an amended answer, and relied upon in the trial; and if any error was committed by the court in sustaining the exceptions, the defendant has waived it by pleading over.

Considering the case upon the merits, we are called upon to decide whether the decree is warranted by the evidence produced before the court. This presents the question of the abandonment of the mining claim and ditch by the original proprietors. Willett and his co-tenants were the original appropriators of the placer mine and water rights; they constructed the ditch, and were in the actual occupancy of the property from 1870 or 1871, up to the latter part of 1872; during this time they were vested with certain possessory rights, which, as against all other claimants, except the government, amounted to title; this title was good and sufficient so long as they remained in possession and complied with the federal, State and local laws and regulations.

But these are rights which may be divested, either by sale, gift or abandonment; no sale or gift was made until long after

the appropriation of the property by the appellees; it therefore only remains to inquire if the property was abandoned prior to such appropriation. Abandonment is a matter of intention, and operates instanter. Where a miner gives up his claim and goes away from it, without any intention of repossessing it, and regardless of what may become of it, or who may appropriate it, an abandonment takes place, and the property reverts to its original *status* as part of the unoccupied public domain. It is then *publici juris*, and open to location by the first comer; no subsequent sale by the former locator in such case, after other rights have intervened, will convey any right or title to the grantee, for his rights being wholly divested by the abandonment, he has none to convey. *Richardson v. McNulty*, 24 Cal., 339; *Davis v. Butler*, 6 Cal., 510.

The evidence shows that neither Wesley Willett, James Willett, nor Samuel Hammett occupied the property since 1872; nor is there any competent testimony showing that they ever authorized any one to look after the property for them, or to exercise any control over it. All that appears in the testimony about Stone, of Granite, acting for them, is hearsay. Stone was not a witness in the cause, and it appears that he was even ignorant of the residence of Willett, as he was unable to furnish the appellant his address when he desired to purchase the ditch.

The possession of Watt and McKay can not be said to be the possession of Willett; they were not lessees, but appear to have worked on their own account, and for their own profit during their occupancy of the premises; they likewise abandoned it prior to the entry of the appellees in August, 1875.

Appellant subsequently ascertained the address of Wesley Willett, who was in the state of Texas, and procured from him a deed of the ditch. In our view of the case, this deed is of no effect whatever; at the time of its execution Willett had no interest to convey.

In regard to the claim of the appellant, that he made a prior appropriation of the water, we have to say, that in our judgment, the acts relied upon by him are not sufficient to constitute an appropriation of the water right in controversy.

Finding no substantial error in the record, the decree will be affirmed.

Decree affirmed.

DAVIS v. BUTLER.

(6 Cal., 510. Supreme Court, 1856.)

Abandonment, independent of the Statute of Limitations. Abandonment may consist of a single act or a series of acts. It determines the right of the party, so that the property becomes to him "as though he had never owned or occupied it." And it is independent of the Statute of Limitations.

Appeal from the County Court of Amador.

This action was brought before a justice of the peace to try the right to a mining claim, and came by appeal to the county court.

Verdict for plaintiff. Defendant, on appeal to this court, based his case upon the fact that an instruction asked by defendant, upon the question of abandonment, had been given, *subject* to a qualification stated in the opinion of the court.

SMITH & HARDY, for appellant.

ROBINSON, BEATTY & BOTTS, for respondent.

Argument for appellant.

If a party abandon his claim or privilege in or to anything, he loses control over it, and has no rights afterward and it may be taken by any one, no matter whom. *French v. Braintree Man. Co.*, 23 Pick. 216.

If A, being the owner of property, abandon it, he loses all right of property in it. *McGoon v Ankeny*, 11 Ill. 558.

The law of abandonment in this State should be even stronger than elsewhere. Here few men have title, save by occupancy, and an abandonment of such a title is always more readily inferred than where titles are perfect and held by deed.

Argument for appellee.

"Given, subject to the seventeenth section of the Statute of Limitations," etc., we suppose means that the law does not presume an abandonment, in a shorter period of time than that specified in the statute as the limitation to bringing an action for the recovery of personal property. Such we think,

is the law. A party may, in a moment, abandon property but the abandonment must be shown by some act or circumstance clearly indicating the intent of the party. Our law does not presume abandonment of personal property in less than three years, the time limited in the seventeenth section of the Act of Limitations.

Mr. Chief Justice MURRAY, delivered the opinion of the Court. Mr. Justice HEYDENFELDT and Mr. Justice TERRY concurred.

On the trial of this cause, the following instruction was asked: "That if the jury found from the testimony that the plaintiff had abandoned his interest in the claim in controversy, and did not intend to return and work it before the commencement of this suit, he could not recover," which was given with this qualification: "subject to the seventeenth section of the Statute of Limitations, which permits an action to be brought for the recovery of personal property, any time within three years."

The qualification was erroneous; the inference of abandonment may arise from a single act, as well as from a series of acts, continued through a long space of time. It is a fact to be determined from the particular circumstances of the case. A party, after having abandoned his claim, will not be permitted to come in within the time allowed by the statute for commencing civil actions, and re-assert or resume his former interest, to the prejudice of those who may have afterwards appropriated it.

The statute was not designed to operate on such cases, giving a man a right for a term of years, in the premises against his express wishes.

The abandonment determines the right of the party from the day of the act, and the property is to him as though he had never owned or occupied it.

Judgment reversed and new trial ordered.

McGOON v. ANKENY.

(11 Ill., 558. Supreme Court, 1850.)

Slag. A party who, having made slag, and considering it worthless, casts it away with the intention of abandoning it, thereby divests himself of the title.

Sale of chose in action. The owner of slag can not sell and transfer a good title to it, when in the adverse possession of another who claims it as his own; he has but a right of action against the person in possession which is not the subject of legal transfer.

This was an action of assumpsit, brought by Ankeny against McGoon, in the Jo Daviess Circuit Court, to recover the value of a quantity of slag, of which Ankeny claimed to be the owner. The suit was taken before Sheldon, Judge, and a jury, at a special term in October, 1849, when a verdict was found for the plaintiff Ankeny, for the sum of \$523.60. A motion was made for a new trial, which was allowed, unless Ankeny would remit \$220, which he consented to do; and, thereupon, judgment was rendered for plaintiff for the sum of \$303.60. McGoon appealed to this court. The facts upon which the opinion is based, are sufficiently stated by it.

E. S. LELAND, for appellant.

M. Y. JOHNSON, for appellee.

Opinion by Mr. Justice CATON.

Without knowing something more of the nature of the lease from the government to the smelters who made this slag, it is impossible for us to say whether the general property in the material which they worked continued in the government or not, as was insisted by the counsel for the appellant, nor is the question of abandonment properly before us. It is undoubtedly true, that if those who made the slag, considering it entirely worthless, cast it away with the intention of abandoning it, they thereby divested themselves of their title to it, and could have no more cause to complain when it was taken by another than as if they had never owned it, unless they reclaimed it, without violating the rights of others, and before

any other person had become possessed of it or had appropriated it. The evidence of abandonment in this case is certainly very strong, but that was a question more properly for the jury than for us; and we shall, therefore, not pursue the inquiry.

There is a question, however, which lies at the foundation of the plaintiff's right to recover, as the case now stands, and upon which the judgment must be reversed. Mrs. Kelso swears that in 1840 or 1841, her late husband Mr. Washburn, sold the slag in question to the defendant below for \$150, which was paid in money. She further states that McGoon had been in possession of the slag two or three years before she ever heard of any claim set up to it by Ankeny or any one else, although she had heard frequent conversations between Journey Smith and others and Washburn in relation thereto. Gear replevied the slag from McGoon on the 20th of May, 1843, and the plaintiff below did not purchase it till the first of June following, and while the replevin suit was pending. Beyond controversy, then, at the time of the plaintiff's purchase, the property was in the adverse possession of Gear, who was claiming it as his own. That being the case, the law is well settled that no other person, although the real owner, could sell it and transfer a good title. *Young v. Ferguson*, 1 Litt. 298; *Gardner v. Adams*, 12 Wend. 297. While the property was thus held adversely, the real owner had but a right of action against the person in possession, which was not the subject of legal transfer. As well might Journey and others have transferred their right to sue McGoon or Gear, for trespass to real estate, or for an assault and battery. To allow this, is deemed prejudicial to the interests of society, as tending to promote litigation. The law will not tolerate a principle which will allow a man of litigious disposition to go about the community, hunting up stale claims, or even meritorious ones, against his neighbors, either for the purpose of harassing them, or for speculation.

Without investigating several minor errors which have been assigned, we find here an insuperable barrier to the plaintiff's right to recover, and the judgment must therefore be reversed with costs, and the cause remanded.

• Judgment reversed.

RICHARDSON V. McNULTY ET AL.

(24 Cal., 339; B. & W. L. C., 206. Supreme Court, 1864.)

Bringing suit is evidence of intent. Upon the question of abandonment, the fact that the party charged with abandoning, brought suit for the premises, although against parties not connected with the present controversy, is evidence upon the question of his intent; and the record of such suit is proper evidence to prove such fact—and in such case the court should by charge limit the effect of the record to its proper object.

Title by occupation and its incidents. The public mineral land is open to appropriation; the act of occupancy signifies the appropriation; once appropriated, it may be transferred by any authorized mode, in which case the continuity of possession is preserved, or the appropriator may abandon it.

Abandonment and gift distinguished. In abandonment the land must be left free to the next comer, without intent to repossess; the land reverts to its former condition *publici juris*; transfer and abandonment are inconsistent terms, and if the transaction amount to a gift it is a transfer and not an abandonment, but the mere desire that another should take his place, does not amount to a gift.

A single erroneous instruction is sufficient to reverse, unless upon the whole case the judgment ought to stand.

Title in third party. The rule that an outstanding title in a third party will prevent a recovery by plaintiff, does not apply where both parties claim by mere possession.

Appeal from District Court, Seventeenth Judicial District, Sierra County.

The opinion states the facts.

VAN CLIEF & BOWERS and NILES SEARS, for appellants.

JOHNSON & WILLIAMS, and CREED HAYMOND, for respondent.

By the Court, SANDERSON, C. J.

This is an action of ejectment to recover an undivided sixteenth interest in a certain mining claim, situated in the county of Sierra. The defense mainly relied upon is abandonment. On the trial, the plaintiff offered in evidence the judgment roll in a certain action brought by him against one Donahue & Westfield, to recover the same interest sued for in this action, to which the defendants were not parties or privies.

The judgment roll was admitted by the court under the exception of the defendants. Touching the effect of the judgment roll as evidence, the court instructed the jury as follows:

“None of defendants in this action were parties to the action in which Richardson was plaintiff and Donahue & Westfield were defendants, and the papers in the last named action which have been introduced in evidence in this case do not tend to show that the plaintiff herein has title to the ground in dispute as against the defendants in this action; and the defendants in this action are not bound by any order, judgment or decree rendered in said action of *Richardson v. Donahue & Westfield*. The jury, however, in considering the other question of abandonment, may take into consideration the fact that such suit was brought by Richardson in determining the intent of the party.”

For the purpose for which it was received by the court, the judgment roll was clearly admissible. The fact that Richardson had, long prior to the commencement of the present action, brought another suit to recover the same ground against other parties who were then in possession and claiming it adversely to him, and had prosecuted it successfully to final judgment, was strong evidence, if not conclusive, upon the question of abandonment. The fact could not be proved more satisfactorily than by a production of the record itself. The fact that, unexplained, it might mislead the jury upon some other question involved in the case, does not affect its admissibility. In such a case it is the duty of the court to guard against any unlawful effect, as was done in the present instance by proper instructions to the jury; and if the court fails to do so, it is the duty of counsel to ask instructions to that end.

The next error assigned is as to an instruction given by the court, in the following words, viz.: “The abandonment must also be made without any desire that any particular person should acquire the property, for if such desire exist, the transaction might be construed a gift.”

This is but part of a long instruction upon the question of abandonment given by the learned judge of the court below, remarkable for its clearness of diction and soundness in principle, and to which no other objection is made. The sentence above quoted appears to be based upon the authority of *Ste-*

phens v. Mansfield, 11 Cal. 365, and it is claimed by counsel for the appellants that the opinion in that case, so far as it gives sanction to this definition of abandonment, is mere *obiter dictum*. In that case the plaintiff, Stephens, was in possession of a town lot in the city of Placerville, part of the public domain, under a deed from another, who was in possession at the time the deed and possession of the lot was given. After remaining in possession under his deed for some months, Stephens made a verbal sale of the lot, for six hundred dollars, to one Hunter, who occupied for about two years, and sold to the defendant, Mansfield. It was claimed by the defendant that the transaction between Stephens and Hunter amounted to an abandonment of the lot in favor of the latter; but the Court held otherwise, and that "admitting the interest of the plaintiff in the premises such as could be divested by abandonment there can be no such thing as abandonment in favor of a particular individual or for a consideration. Such act would be a gift or sale."

It is true, as contended by counsel for the appellants, that so far as the case of a gift is concerned, this decision goes outside of the facts; but, upon principle, there is no difference between the act of selling and the act of giving, so far as their effect as evidence upon a question of abandonment is concerned. If the gift be complete—that is to say, if the thing given be delivered, and accepted by the donee, a transfer is the result, which transfer as much precludes the idea of abandonment as a transfer resulting from a sale. No question of abandonment can arise where a transfer has been had by the act of two parties. To an abandonment of the character involved in this and all similar cases, there can be but one party. The mining ground in controversy, before it was occupied by the plaintiff, so far as the right to mine the same by parties without title is concerned (and this is true of all the public mineral land of the State), was *publici juris*, and open to the appropriation of any one desiring it. By the act of occupancy, the plaintiff made it his, and manifested his intention to do so. Once his, it continues his until he manifests his intention to part with it in some manner known to the law. He may sell it, or give it to another, or transfer it in any other mode authorized by law (thereby preserving the continuity of possession), or he

may abandon it. In doing the latter he must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself in any event, and regardless and indifferent as to what may become of it in the future. When this is done, a vacancy in the possession is created, and the land reverts to its former condition, and becomes once more *publici juris*, and then, and not until then, an abandonment has taken place. There can be no abandonment except where the right abates, and ceases to exist. If it be continued in another, by any of the modes known to the law for the transfer of property, there has been no abandonment, for the right, first acquired by the occupancy still exists although vested in another, and the continuity of possession remains unbroken. But the occupant can not continue his right in another by the mere act of volition; nor is his right kept alive by a mere desire that it may become vested in a particular person. Such a volition or desire does not amount to a gift, for there can be no gift without an acceptance. If the wish or desire is expressed to the person in whose behalf it is entertained, and thereupon he occupies the land, a gift is the result, and the transfer is made complete—and not otherwise. The mere wishes and desires of the occupant are only effectual to preserve the right in himself, and not to transmit it to another; and the case of *Stephens v. Mansfield*, so far as it can be fairly construed to go beyond the views here expressed, is not law.

From what has been said, it follows that the charge in question, so far as it instructs the jury that there can be no abandonment where the transaction amounts to a gift, is correct; but that it is erroneous so far as it instructs them that leaving the claim, with a desire that a particular person may acquire it, might be construed to be a gift. The error is in the definition of a gift, rather than in that of an abandonment.

It only remains to be seen whether the error, such as it is, could have affected the verdict of the jury to the prejudice of the defendant. The general rule is, that where an erroneous instruction has been given, the judgment must be reversed, unless it appear from the record that the appellant has not been prejudiced thereby. The testimony upon which, as the appellants claim and admit, this instruction was founded, is to the

effect that while the plaintiff was absent at Frazer River, he had a correspondence with one Cody about the claim, in which Cody asked him to send him (Cody) a bill of sale of the claim, and he would "keep up the claim for him;" that thereupon, after consulting a lawyer as to whether Cody, under such circumstances, could hold the claim as against him, he sent Cody a bill of sale, but that the same was never received by Cody. It also appears from another part of the testimony, that Cody had offered to pay the assessment levied by the company upon the plaintiff's interests, but the Secretary refused to receive the money from Cody, upon the ground that he had no authority to receive it from any one but the plaintiff. This was evidently done with a view to work a forfeiture and sale of the plaintiff's interest, under the by-laws of the company, and doubtless induced Cody's application for the bill of sale.

How it can be claimed that this evidence tends to establish an abandonment, we are unable to perceive. In our judgment, its tendency is directly the reverse, and the court would have been justified in refusing to give any instructions founded upon such a theory, as calculated to mislead a jury. And, had the verdict been different, we are inclined to think that the plaintiff, on appeal, would have been entitled to a reversal on that ground. Giving the instruction greater purpose than is claimed for it by appellants, and assuming that the charge, in effect, instructs the jury that they can not find an abandonment from the facts disclosed in the evidence, no error, in our judgment, has been committed. It follows that the instruction, in view of the evidence upon which it was founded, and as to the legal effect of which it was given, could not have operated to the prejudice of the appellants, and that, therefore, they are not entitled to a reversal upon that ground.

The next and last error assigned is found in the following instruction: "If the plaintiff, however, has shown a right in himself to the property in dispute, then, however weak his title appear, he must recover if it be better than the defendant's title." This is but one clause in the instruction upon the question as to what title or right the plaintiff must prove in order to recover; and in determining its force and effect it must be considered in connection with that portion immediately preceding, which is as follows: "The defendants being

in actual possession of the ground in dispute, then, although they have no right there whatever, yet the plaintiff can not, from that circumstance alone, recover in this action, for the rule of law is that he must recover, if at all, upon the strength of his own title. In other words, the plaintiff must show a right in himself, although there be none in the defendants."

In *McGarritty v. Byington*, 12 Cal. 426, which was an action like the present, to recover a mining claim, an instruction, in substance the same as that to which the appellants except, was given, and came before the late Supreme Court for review, and Mr. Justice Baldwin said: "It is true, in ejectment the plaintiff must recover on the strength of his own title; but here, the charge must be taken in connection with the case. There was no outstanding title, and only a question of prior possession. The charge did not amount to much, but what there was of it was very harmless. It amounted to telling the jury to find for the plaintiff if they thought they ought to."

It is insisted that the present case differs from that of *McGarritty v. Byington*, because, as is claimed, it involves an outstanding title. There may be an attempt to raise a question of that kind, but under numerous decisions of the late Supreme Court, no such question can be made in an action of ejectment in which the plaintiff, as in the present case, relies solely upon prior possession, and the defendant fails to connect himself in any manner with the outstanding title. *Bequette v. Caulfield*, 4 Cal. 278; *Bird v. Lisbros*, 9 Cal. 1; *Hubbard et al. v. Barry*, 21 Cal. 321. In this case only a question of possession is involved. The naked prior possession of the plaintiff is pitted against the naked present possession of the defendants. Strict title is not involved. The doctrine that the plaintiff must recover upon the strength of his own title is applied to cases where the strict legal title in contradistinction to a mere possession, is involved. In such a case the defendant may defeat the legal title, relied upon by the plaintiff, by showing the true legal title to be outstanding. Ejectments for mining claims where neither party has, strictly speaking, any legal title, but both, in strict law, are intruders upon what belongs to another, are mere contests for possession, and their solution is only embarrassed by an attempt to adhere

to language only adapted to cases where the strict legal title to land is involved. Such ejectments might be more properly called actions to determine the right to mine in a certain locality. Practically, the real question involved in all such cases is, which, as against the other, has the better right to mine the land in question. Generally, the solution of this question depends in a great measure upon the rules and regulations of the mining district in which the ground is located, established by the miners themselves, and not unfrequently its just solution is prevented, rather than aided, by an adherence on the part of counsel and courts to a phraseology hardly applicable, when the character of the right involved is considered. That portion of the charge under consideration which is objected to by the appellants, taken in connection with what immediately precedes it, states the general propositions governing this class of cases correctly. More apt words might have been employed, but we can not for that reason reverse the judgment. If it is deficient in any respect, it is because it does not state what, in such cases, constitutes the better right, or "title," as the court terms it. If the court had said, in connection, that the prior possession of the plaintiff, if proved to their satisfaction, was better than the subsequent possession of the defendants, there would have been no room for criticism.

All the testimony which was given upon both sides is embraced in the statement, and we are satisfied therefrom that no injustice has been committed, and that, upon the whole case, the verdict of the jury was right, and the judgment ought to stand.

The judgment is affirmed.

MALLET V. THE UNCLE SAM GOLD AND SILVER MINING CO.

(1 Nev., 188. Supreme Court, 1865.)

Officers de facto. The selectmen of the county of Carson, assumed the power to appoint certain persons to the offices of justice of the peace and constable without warrant, but they were commissioned by the governor of Utah Territory, who was authorized to issue such commissions, and

they acted in their respective capacities under such commissions. *Held*, that they were officers *de facto*, and their acts as to third persons valid.

Jurisdiction of inferior courts—Presumptions—Service. A judgment of a court of special and limited jurisdiction should not be admitted in evidence to show title to property obtained under it, until the facts necessary to confer jurisdiction are affirmatively shown; nothing is presumed in favor of the jurisdiction of inferior courts, and it is imperatively necessary that due and legal service of summons upon the defendants should be shown.

Ejectment—Outstanding title. Defendant, in ejectment for a mining claim, may show a conveyance by plaintiff or plaintiff's grantor, prior to the bringing of the action, to show as a defense that plaintiff has no title through the chain of title by which he claims. A naked trespasser can not show outstanding title in a third party, except as a means of showing the want of all title in the plaintiff.

District rules—Judicial recognition—Appropriation. The mining laws when once established and recognized by the courts, (and in Nevada by statute,) have the force and obligation of legislative enactments, and where courts presume title in the first appropriator, it can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired.

Location—Forfeiture. When the district laws point out directly how mining claims must be located, and how the possession once acquired is to be maintained, that course must be strictly pursued, and a failure to do so might work a forfeiture of the ground.

Meaning of term Abandonment. Abandonment is a word which has acquired a technical meaning, and there can be no reason why it should receive a different signification when applied to a mining claim than that which it has received in the books.

Intention. In determining the question of abandonment, the intention is the first and paramount object of inquiry.

Lapse of Time. Time is not an essential element of abandonment; the moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete. But lapse of time may be a strong circumstance in connection with other circumstances, to prove the intention to abandon. Bare lapse of time short of the Statute of Limitations, unconnected with other circumstances, is no proof of abandonment.

Claim, how lost. The right to a mining claim acquired by appropriation and occupancy may be lost: 1. By forfeiture under the district rules. 2. Where no district rules exist, by failure to work the claim with reasonable diligence. 3. By abandonment.

California Precedents. The decisions of the Supreme Court of California, referred to as establishing a system of common law upon the questions peculiar to the occupation of the mineral lands upon the public domain.

Tenants in common—Possession of one—Delinquent partner. The possession of one tenant in common inures to the benefit of all, until such possession becomes adverse.

Obiter. If one partner or tenant in common, having become associ-

ated with his copartners in the development of a claim, voluntarily leaves it in possession of his copartners and refuses to bear his just proportion of expense, and afterward brings his action to recover his interest, equity would, upon a proper showing, stay his relief until he had paid his full proportion of expense.

Appeal from the First Judicial District of the State of Nevada, Storey County, Hon. RICHARD RISING, presiding.

The facts appear in the opinion of the court.

THOMAS SUNDERLAND, QUINT & HARDY and J. H. HARMON, for appellant.

J. S. PITZER and C. J. LANSING, for respondents.

● By the Court, LEWIS, C. J.

This action is brought to recover one hundred feet, undivided, in that certain mining ground located in the county of Storey, and now occupied and claimed by the defendants, the Uncle Sam and Baltic Gold and Silver Mining Companies. The plaintiff alleges in his complaint that on the 16th day of November, A. D. 1863, he was the owner as tenant in common, in the possession and entitled to the possession of one hundred feet, undivided, in the Uncle Sam and Baltic Gold and Silver Mining Companies; that said claim, at the time of its location was three thousand feet in extent; that after the location thereof by the grantors of plaintiff and others, it was divided between the two companies, defendants in this action, the Uncle Sam taking the north twelve hundred feet and the Baltic taking the south eighteen hundred feet; that plaintiff, his grantors and co-owners in said claim, owned and were possessed thereof, by virtue of their location and appropriation of the same on the 12th day of March; A. D. 1860; that he by himself and his grantors remained in possession of said undivided one hundred feet of ground as tenants in common with his co-owners until the ouster complained of. It is further alleged that on the 16th day of November, A. D. 1863, the defendants, by their agents, servants, and employes, wrongfully and unlawfully entered upon said claim and ousted plaintiff therefrom, and that they unlawfully and wrongfully withhold the same from him. The answer specifically denies each and every allegation of the com-

plaint, but admits that defendants are in possession of the premises, alleging title and right of possession in themselves, and that neither the plaintiff nor his grantors have been seized or possessed of the premises within two years next preceding the commencement of this action; and that they and those under whom they claim title have been in the quiet and peaceable possession thereof for more than two years before the bringing of this suit; that long before the commencement of this action plaintiff and his grantors abandoned whatever right, title and interest he or they may have had in the claim aforesaid. The facts, outside of the pleadings, as developed by the record, are substantially as follows:

In March A. D. 1860, the mining claim now occupied by the defendants was located by Charles Phillippi, Petro Anisini, and thirteen others; that these persons or some of them, occupied and worked the claims thus located up to the 9th day of March, A. D. 1861, at which time the entire claim was sold under execution issued out of a justice's court against the owners thereof, to one H. W. Johnson, to whom the constable making the sale executed a deed of the premises so sold, and placed him in the possession of the entire claim. A large number of the claimants thus ejected, availing themselves of an offer made by Johnson, redeemed their respective interests, and were admitted to all their original rights in the claim with him. From Johnson and the persons who thus redeemed their interests the present defendants derive their title. Phillippi and Anisini, the locators from whom the plaintiff claims his title, did not redeem their interests; whether they offered to do so or not, is matter of no consequence in this action, if the view we take of their rights and liabilities be correct.

At the trial, the defendants, for the purpose of showing title and right of possession in themselves, offered in evidence the complaint, summons, return, judgment, execution, evidence of the sale, and the constable's deed by which Johnson became possessed of the claim; the docket of the justice by whom the judgment was rendered was also offered for the purpose of showing the proceedings had in the action against Phillippi and others, and in which the judgment was rendered; to all of which the plaintiff's counsel objected, urging various reasons in support of the objection among which are: That the return

of the officer does not show that the defendants in that action were served with process within the jurisdiction of the justice, and that the justice rendering the judgment and constable who served the process were neither officers *de facto* nor *de jure*; and that, therefore, the judgment is void, and defendants could therefore obtain no right under it. We do not deem it necessary to notice any of the other objections interposed.

The court below ruled out all the proceedings had before the justice, together with the constable's deed to Johnson, upon the ground that the judgment was a nullity, and therefore the defendants acquired no rights under it.

The defendants then offered in evidence several deeds from Phillippi to McMahon, Swift, and others, conveying all his interest in the Uncle Sam Company, and all bearing date prior to the time of the execution of this deed to Small, the grantor of plaintiff, for the purpose of showing that at the time of the making of his deed to Small, Phillippi had no interest whatever in the ground in controversy, and that Small, and the plaintiff Mallett, received nothing by such conveyance. The books of the old Uncle Sam Company were also offered for the same purpose, all of which were admitted by the court below, but were afterward stricken out and the jury instructed to disregard them, for the reason, as it appears by the instructions of the court, that the defendants being mere naked trespassers were not in a position to show outstanding title to defeat plaintiff's claims.

These rulings of the court—the giving of the instructions asked by plaintiff and refusal to give instructions asked by defendants—are assigned as error by appellants; and as the record in this case presents numerous questions involved in other cases against the same defendants, it will perhaps be a matter of utility to pass upon all such as may be deemed of importance in the determination of the others.

The first question presented for our consideration is that raised upon the ruling of the court in rejecting the docket of the justice and the proceedings had before him. It appears from the testimony that Smith, the justice, and Reese, the constable, were not regularly elected to their respective positions, but were appointed by the selectmen of the county of Carson, and received their commissions from the governor.

It is conceded that the appointment by the selectmen was an assumption of power not warranted by the statutes of Utah; but it is claimed that, having been commissioned by the power authorized to issue commissions to such officers, and they having acted in their respective capacities, were officers *de facto*, and that therefore their acts as to third persons are valid and their proceedings legal. Smith and Reese, discharged the functions of justice and constable for the county of Carson, and seem to have been generally recognized as legally constituted officers. It may often be a matter of extreme difficulty to determine whether a person discharging the duties of an office is to be deemed a mere intruder, or an officer *de facto*; but a stronger case in favor of clothing such persons with official character and giving validity to their acts could scarcely be presented than the one at bar. Indeed, whenever a person so discharging the duties of an office is not a mere usurper of his position, the reason and spirit of all the authorities incline to support him as an officer *de facto*, and to sustain and give validity to his acts.

It is said that on the one hand he is distinguished from a mere usurper of an office, and on the other from an officer *de jure*. The rule is dictated by the most obvious necessity. If the acts of public officers could at any time be overthrown by the showing of some irregularity or informality in their elections or appointment, all confidence in the judgment of courts would be destroyed, and judicial proceedings would ever be involved in doubt and uncertainty.

In the case of the *People v. White*, 24 Wend. 539, this question is fully argued by the learned chancellor, who says:

“An officer *de facto* is one who comes into a legal and constitutional office by *color* of a legal appointment, or election to that office, and as the duties of the office must be discharged by some one for the benefit of the public, the law does not require third persons, at their peril, to ascertain whether such officer has been properly elected or appointed before they submit themselves to this authority, or call upon him to perform official acts which it is necessary he should perform.”

Sutherland, J., in the case of *Wilcox v. Smith*, 5 Wend. 234, uses the following language:

“There must be some color of an election or appointment,

or an exercise of the office, and an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment."

Viewing the position of the justice and constable in this case in the light of the authorities, they must be considered officers *de facto*, and their acts as to third persons be held valid.

But a more serious objection to the introduction of the judgment, and the subsequent proceedings thereon, arises from the failure to show that the justice had jurisdiction of the persons against whom the judgment was rendered.

It nowhere appears that the summons in that case was served within the territorial jurisdiction of the justice, nor that any of the defendants appeared, either personally or by counsel. This objection, independent of the others argued, was sufficient to authorize the judge below in excluding all the proceedings had before the justice. By the laws of Utah the jurisdiction of justices of the peace extended to the limits of their respective counties only. That service of a summons out of the county in which he had jurisdiction would be a nullity, there can scarcely be a doubt. A summons so served would have no more force or effect than if it were served out of the territory itself. If it were shown affirmatively that the summons was not served within the limits of Carson county, and that the defendants did not appear, no doubt can be entertained that the proceedings based upon such a service would be *coram non jndice*, and void. No rule of law is more firmly established, or more generally recognized, than when any rights are claimed under or by virtue of the judgment of a court of special and limited jurisdiction, all the facts necessary to confer jurisdiction must be affirmatively shown. 2 Cow. & Hill's Notes, Phil. Ev. 906; *Burns v. Harris* (opinion of Bronson), 4 Comst. 374; *Bowman v. Russ*, 6 Cow. 234; *Smith v. Andrews*, 6 Cal. 654; *Swain v. Chase*, 12 Cal. 283; *Lowe v. Alexander*, 15 Cal. 296.

Jurisdiction in superior courts is presumed until the contrary appear, but nothing is presumed in favor of the jurisdiction of inferior courts.

The rule, *omnia præsumuntur rite esse acta*, has no appli-

cation to the facts giving jurisdiction to such courts. In *Sollers v. Lawrence*, Willes, 416, the court, in speaking of courts of limited jurisdiction, says: "The rule is that nothing must be intended in favor of their jurisdiction, but that it must appear by what is set forth in the record that they had such jurisdiction. The fact of the summons having been served upon the defendants, would not necessarily bring them within the jurisdiction of the court; there must not only be a service, but there must be such service as will give the court jurisdiction. If a service out of the county would give no jurisdiction, the necessity of showing that it was *had within the county* is certainly as imperious as it is to show that service was had at all. It is claimed, however, by counsel, that because the constable states in his return that some of the defendants were not to be found within his county, that therefore the *presumption* is that those upon whom he obtained service were within the county; but the very acknowledgment that such a presumption is necessary, is itself a confession of the insufficiency of the return. The rule is inflexible that no such presumption can be entertained. Though the judgment and proceedings under it were properly rejected when offered for the purpose of showing title in defendants, yet whether it should have been admitted when offered merely to show that the defendants were not mere naked trespassers, is a question which it is scarcely necessary to pass upon in this case, as we think it perfectly competent for the defendants to have shown the outstanding title derived from Phillippi, independent of whether they were trespassers or not.

The court below erred in ruling out the deeds from Phillippi to McMahon, Swift and others. If these deeds established the fact that at the time of the conveyance to Small, Phillippi had no interest in the premises or claim in question to convey, Small got nothing and could convey nothing to the plaintiff. If the defendants were not allowed to show such a state of things, we should have the novel case of a plaintiff, having no title and never having been in possession, recovering a mining claim from one in the actual occupancy, and in whom the law presumes title. Surely this would not harmonize with the rule of law so frequently declared and acted upon—that the plaintiff must recover on the strength of his own title. If such

rule were allowed to prevail here, the result would be that the plaintiff might recover the seventy-five feet claimed in this action, and McMahon, Swift and others might recover the two hundred and thirty-seven feet conveyed to them in another action. This action could not possibly be a bar to one brought by them, and thus the grantees of Phillippi would recover three hundred and twelve feet upon conveyances from a person who had but two hundred feet himself. This seems to be the legitimate result of the rule insisted on by the plaintiff's counsel. That a mere naked trespasser can not show outstanding title as against one claiming by virtue of prior possession there is no question, but that such trespasser can show that the plaintiff, or those from whom he derives title, has parted with his right of possession by conveyance, or lost it by abandonment, is equally well settled on principle, if not on authority.

Where bare possession is relied on, it is but the announcement of a clear principle of justice, to say that a mere naked trespasser shall not be allowed to set up outstanding title to defeat the claim of one who, by prior appropriation or occupancy, shows a present right of possession. Ordinarily, the proof of outstanding title is no defense to the plaintiff's claim, and where it is not, such proof should not be allowed. In fact, this rule, so frequently misapplied, is only applicable in those cases where even admitting the outstanding title, still as against the defendant, the plaintiff would be entitled to recover. If A, a mere naked trespasser, oust B, it can be no defense to such ouster that the real title is in C, because B, being in possession, has a right which is good against A, and all the world but the real owner; and as the inquiry in such a case would be confined to the question which of the two, A or B, was entitled to the possession, it is evident that it would avail A nothing to show that the real title was in C, as that would not justify his possession against one whom he had evicted, or who shows a prior possession to himself. Possession itself is a title, though of the lowest and most imperfect degree: 2 Bl. Com. 195. Prior possession, then, is as potent to sustain ejectment against all subsequent trespassers upon that possession, as the strict legal title itself would be; it would therefore be no defense in an action brought against a mere naked trespasser to recover possession upon such a title,

that the strict legal title was in another. But the action of ejectment rests upon a present right of possession in the plaintiff. If, therefore, before action brought, the plaintiff conveyed away his title, or parted with his right of possession, or if he obtained no title from his grantors, to show that fact would not be so much showing title in a third person, as that the plaintiff had voluntarily relinquished his right to the possession. That would be a direct answer and good defense to his claim of possession, whereas merely showing an outstanding title not derived from plaintiff, would be no defense to his right acquired by prior possession. If the plaintiff acquired no title by the deed from Small to him, he would seem to have no ground upon which to recover in this case. It appears that prior to the time when defendants took possession of the Uncle Sam claim, the deeds offered in evidence had been executed, and if they conveyed anything, conveyed Phillippi's entire interest in the claim. Neither was he in the actual possession of the claim, at the time defendants entered. True, those who had been his co-tenants were in possession, but in no view could their possession be considered his, after he had conveyed away all his interest; they then held possession, not for Phillippi, but for his grantee. So the ouster complained of was not an ouster of the grantor of plaintiff or those from whom he claims title, but an ouster of the first grantees of Phillippi, who alone would have a right to complain. If those deeds conveyed his title, what right had Phillippi when defendants entered upon the claim? He was neither in possession, nor had he the right of possession. Surely, then, he could show none of the facts which would entitle him to a recovery in ejectment. To support this action the plaintiff must show a right of possession in himself at the time of bringing his action. Would not the showing of a conveyance by him or his grantors, of all his interest in the claim at least, go far to negative the presumption of such right of possession in him? If it can be shown that he is not entitled to possession because of his having abandoned his interest, upon what rule of logic or principle of law can it be said that the same fact may not be established by showing that by deed he conveyed away such right?

Are the loose circumstances by which abandonment is usu-

ally proven, better evidence to show the relinquishment of a right than a deliberate conveyance by a deed? This view of the case seems to be fully sustained by the cases of *Bird v. Lisbros*, 9 Cal. 1, and the case of *Dyson v. Bradshaw*, 23 Cal. 528.

All the remaining questions presented by the record in this case, will necessarily be passed upon in reviewing the following instructions, asked by the defendants, and refused by the court:

1. "The right to mine in the public land (and all land is presumed to be public), gives the occupant no title to the land. His only right is acquired by his appropriation in the manner prescribed by mining laws, and this right, after being acquired, is continued only by use and occupation, and is lost by failure to use or occupy."

2. "The jury is authorized to find that a party loses his right in mining ground by such failure, even without an intention to abandon."

No questions, perhaps, have ever engaged the attention of our courts which involved principles of greater or more general importance than those presented for our consideration upon the instructions in this case. If we follow the reason and spirit of the decisions by the Supreme Court of California, upon analogous questions, but few serious difficulties will present themselves in the solution of all the questions presented by the record in this case; but if, on the other hand, they be disregarded, and we adopt the theories of the learned counsel for appellants, we are at once launched into chaos and endless uncertainties, with no precedent to guide and no legislation to direct the inquiries of the courts. Blindly to follow precedent, regardless of the reasons upon which it is founded, or its applicability to the character and the social and political condition of the people whom it is to affect, would be no less unwise than to ignore and repudiate it entirely. The decisions of the higher courts become part of the common law of our country, and they carry with them a weight of authority in proportion to the ability of the court rendering them, and the obvious reasons upon which they are based. We do not feel authorized, therefore, to disregard such adjudications and adopt theories, the innovation of which might bring upon us

more evils than are now occasioned by the defects of the present system.

Certainty in the law, more, perhaps, than in any other feature, gives it efficacy and secures the object for which it is created. Fluctuating and conflicting adjudications would be no less prolific of evil than conflict and uncertainty in the legislative enactments of a State. So far, then, as the anomalous rights and character of the miner locating upon the public land, for the purpose of mining, are defined and established by the courts of California, we feel it our duty to recognize them whenever their decisions may be applicable to our condition. Nearly the entire mining interest of this State has grown up under the fostering protection of the law as it was administered and recognized by the courts of that State. To repudiate the theory and principles upon which they have acted, would be to overturn the foundation upon which half our rights rest. The right to the possession of a mining claim, acquired by appropriation and occupancy, may be lost:

First. By forfeiture, where such rights are acquired and regulated by mining laws.

Second. Where no mining laws exist, and the right rests upon bare possession by failure to occupy, or to work the claim with reasonable diligence; and,

Third. By abandonment.

Usually the mining claims in this State have been located and worked with direct reference to the mining laws established in the district where the location is made. Such mining laws, when once established, are recognized by the courts, and indeed the legislature of our State has given them the force and binding obligation of legislative enactment. Stats. 1861, p. 21, Sec. 77. When those mining laws, therefore, directly point out how mining claims must be located, and how the possession once acquired is to be maintained and continued, that course must be strictly pursued, and a failure to do so might work a forfeiture of the ground. By the mining laws of the Gold Hill district, all persons locating a claim were required to do three days' work upon it each month, or that work to the amount of fifty dollars would hold it for six months. If, in that district, neither of these require-

ments were complied with, there would be a forfeiture of right under those laws. When, therefore, the courts presume title in the first appropriator, it can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired. We do not claim that the failure to comply with the conditions imposed by mining laws would work a strict forfeiture, but a kind of forfeiture recognized by the courts of this coast from the earliest day, and which is certainly founded upon rational and just principles. But, in the absence of mining laws, and where the miner's right rests solely upon his possession, a different rule would obtain. The miner then locating a claim would hold only by actual occupancy, and by such work for the development of the mine as would, under all the circumstances, be deemed reasonable, and his right of possession would only be continued by occupancy and use. Such a claim might be lost by the failure to work upon or develop it with reasonable diligence, and the same amount of work which would hold a claim under the mining laws, might not in all cases be sufficient to hold one where no such laws existed. The loss of right in that case would therefore present a very different question from a loss occasioned by failure to comply with the requirements of mining laws. Abandonment is a word which has acquired a technical meaning, and there can be no reason why a different signification should be given to it when applied to the loss of right to a mining claim than that which it has received in the books. It is defined to be "the relinquishment of a right; the giving up of something to which we are entitled."

In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry; for there can be no strict abandonment of property without the intention to do so; thus differing from the loss of right by forfeiture under mining laws, or by the failure to use and occupy where no such laws govern, and in this, too, that abandonment may be complete the very instant the miner leaves his claim, for time is not an essential element of abandonment; the moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete. But lapse of time may often be a strong circumstance,

when connected with others, to prove the intention to abandon, though the bare lapse of time, short of the Statute of Limitations and unconnected with any other circumstance, would be no evidence of abandonment—though the right might be lost, as before stated. (*Ante p. 7.*)

The cases upon which counsel rely to sustain the position that mere lapse of time, short of the Statutes of Limitation, will work an abandonment, are cases in equity, where the persons claiming its interposition had no strict legal rights, but relied upon the equity of their cause.

In such cases, upon a cardinal principle of equity jurisprudence, no relief will be granted if there has been an unreasonable delay in asserting the right or claiming the interposition of equity. This seems to have been the only point decided in the case of *Prendergast v. Turton*, 20 Eng. Ch. 97. There the directors of the United Mills Mill Company seem to have had the power to declare the shares of any of the members of the company forfeited if the installments on such shares were not paid within fourteen days after the day fixed for the payment thereof. Prendergast's shares were so forfeited, and his only remedy was in equity to set aside the proceedings of the directors, and the court held that his delay in asserting or claiming his rights had been unreasonable, and denied the prayer of his bill. But had Prendergast a right which he could have claimed in a court of law, no time short of the Statute of Limitations would have deprived him of it. By the application of these general views to the facts in this case, it is evident that there could have been no forfeiture or loss of right on the part of Phillippi, if his co-tenants or partners remained in possession and held the ground as required by the mining laws, for the rule that the possession of one tenant in common or partner is the possession of all, is too well established to be ignored at this time. But it is claimed that Phillippi abandoned his interest in the Uncle Sam Company before his conveyance to Small. That he could abandon, and that his co-tenants or partners could have taken his interest when so abandoned, there is no doubt. But some circumstances beyond the mere lapse of time would be necessary to establish that fact. The case of *Waring v. Crow*, 11 Cal. 366, is directly in point here; and however much its authority may

be weakened by the subsequent doubts of the learned judge who delivered the opinion of the court as to its accuracy, the decision is certainly based upon reason and the sounder principles of law. And though it is urged here with great earnestness that persons owning and associated together in working a mine are not tenants in common, but mining partners, the result in this case would seem to be the same in whichever character they may be clothed. The authorities generally seem to clothe such persons with the double character of mining partners and tenants in common. As to liabilities properly incurred in the development of a claim, they have been held to be answerable as partners; but with relation to the claim itself, they seem to be generally recognized as tenants in common, and there seems to be no sufficient reason for departing from those authorities in this case. We conclude that the possession of one partner or tenant in common inures to the benefit of all until such possession becomes adverse, and that the absence of Phillippi, and refusal to pay assessments for a period short of the Statutes of Limitation, would give his partners or tenants in common no right or title adverse to him in his interest in the Uncle Sam claim; but such lapse of time, with other circumstances tending to show abandonment, might go to the jury to establish it. There seems to be no urgent necessity for adopting a new rule at this late day, as there seems to be no obstacle in the rule itself to complete justice in any case. If one partner or tenant in common, after having become associated with his co-tenants in the development of the claim, *voluntarily* leaves it in the possession of his companions, and refuses to bear his proportion of the expenses incurred by them in development of the same, and should afterward bring his action to recover his interest, undoubtedly, upon a proper application, the equity side of the court would defer his recovery until he had paid his full proportion of the expense incurred in the development and improvement of the claim; and on the other hand, if he had been wrongfully ousted from his possession or rights, the persons so ousting him, or those claiming under them, can acquire no title in the claim adverse to him short of the Statute of Limitations, and of course could not ask the interposition of equity.

In this view of the case, the court below properly gave in-

structions two, five, six and nine, asked by plaintiff, and erred in refusing to give instructions one, two and three, asked by defendants.

The judgment below must be reversed, and a new trial ordered.

BEATTY, J., having been counsel in a similar case against the Uncle Sam Company, did not participate in the hearing of this cause.

Judgment reversed.

OREAMUNO V. THE UNCLE SAM GOLD AND SILVER MINING COMPANY.

(1 Nev., 215. Supreme Court, 1865.)

District rules—Continued observance. To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply with the mining rules and customs established and in force in the district where the claim is situated.

Intention—Law and fact. Abandonment is a mixed question of law and fact. If, in fact, a person intend to give up his claim and quit paying assessments in pursuance of that intention, it is an abandonment in fact.

Forfeiture—Burden of proof. A party who insists upon forfeiture or abandonment, and relies thereon to build up a right in himself to the thing, franchise or easement forfeited or abandoned, is upon first principles bound to establish the fact or facts upon which his asserted claim or right depends.

Appeal from the District Court of Storey County, First Judicial District.

The facts in this case are substantially the same as those in the case of *Mallett v. The Uncle Sam Company*, 1 Nev. 188 (*Ante p.17*), with the exception that the record of judgment by the justice of the peace was not introduced in this case.

CRITTENDEN & SUNDERLAND, J. B. HARMON, and QUINT & HARDY, for appellants.

BALDWIN & HILLYER, for respondent.

BROSNAN, J.

This is an action brought to recover twenty-five feet of mining ground, now held by the defendant. The plaintiff alleges that in May, A. D. 1860, he was the owner, and in the possession, of the ground in controversy. He also avers an ouster, and an unlawful holding by the defendant, in the usual and ordinary form.

The answer admits the ownership and possession of the plaintiff, as by him alleged, and sets up affirmatively in defense of the action:

First. That the plaintiff abandoned all his right in and to the ground before the commencement of this suit; and

Second. That the defendant became owner of the ground claimed in March, 1861, and is still the owner and in possession thereof.

From the statement on file, it appears that *all* the testimony taken on the trial is contained in the statement. After a careful examination of this evidence, we fail to discover wherein it is competent to establish either proposition of the defense

Looking to the testimony in its pertinence and relation to the pleadings, and the verdict based thereon, the case is quite simple and of easy solution. However, a long series of instructions to the jury have been requested by the counsel of both parties, many of which seem to have little relevancy to the facts disclosed by the evidence, but which are calculated rather to mystify than clear up the real questions involved. These instructions demand a brief consideration from the court.

The defendant's counsel takes exception to certain enumerated instructions, given at the request of plaintiff. Of these instructions the fifth, sixth and seventh relate to the force and effect of some judgment, execution and proceedings had under them, which judgment and proceedings were incidentally mentioned on the trial, but nowhere legally proved to exist, or to have taken place. Whilst it may be said of these particular instructions that they were, in our opinion, irrelevant, still we can not see that they have in the least degree prejudiced the case of the defendant.

As abstract propositions of law, they seem to be correct, and

could not, in any manner that we can discover, mislead the jury.

The eighth, eleventh and thirteenth instructions on the part of the plaintiff, with which also the defendant finds fault, have been properly given. They relate to the question of an abandonment at common law, and are a fair exposition of the law on that subject.

We see no error, therefore, in giving the instructions set forth in behalf of the plaintiff, that would justify us in sending the case back for a new trial.

This brings us to an examination of the questions arising upon the refusal of the court to give certain instructions prayed for by the counsel of the defendant, and the modifications of others by the court.

It will be observed, judging from the instructions asked to be given on the part of the defendant, that the learned counsel mainly relied upon the fact of the abandonment, for nearly all the instructions proposed by him, are directed to that question. They vary in form, but are substantially burdened throughout with the same idea—an abandonment; if not in the common law acceptance of the term, then such abandonment or loss, or relinquishment of right as results from neglect to comply with the mining rules and customs of the district.

We think the question, in both respects, was presented fairly to the jury, and that the rulings of the court below on this point, were as favorable to the defendant as counsel could reasonably expect.

The third instruction, given at defendant's request, is in the words following:

"To enable a party to maintain a right to a mining claim, after the right is acquired, it is necessary that the party continue substantially to comply with the mining rules and customs established and in force in the district where the claim is situated, upon which such right is made to depend."

In the fourth instruction, the court, at the request of defendant's counsel, advised the jury as follows:

"An abandonment is a mixed question of law and fact. If in fact the plaintiff intended to give up his claim and quit paying assessments, in pursuance of that intention, it was an abandonment in fact."

These instructions embrace the entire question involved, and submit the whole case fairly to the consideration of the jury. Under them the jury were at liberty to find a failure of the plaintiff to comply with the mining rules and usages of the Gold Hill district, or that he had absolutely abandoned the claim, and upon the finding of either fact, their verdict would have been for the defendant. In this view of the case the defendant has no reason to complain of the modifications of, or the refusal of the court to give the other instructions subsequently asked.

The sixth instruction asked by the defendant is not law, and was properly refused. A party who insists upon a forfeiture or abandonment, and relies thereon to build up a right in himself to the thing, franchise or easement forfeited or abandoned, is, upon first principles, bound to establish the fact or facts upon which his asserted claim of right depends.

It is not necessary to notice the instruction further in detail. There is some obscurity in a portion of the instruction given by the court below, in place of the seventh instruction asked by the defendant; but, in our opinion, this could not have in anywise affected or influenced the verdict. So far as the real question in controversy is concerned, it was fairly submitted under the principles of law relating to the loss or abandonment of a mining claim, as enunciated by this court at the present term, in the case of *Mallett* against the same defendant, and also in the case of *St. John v. Kidd*, 26 Cal. 263.

The judgment of the court below is accordingly affirmed.

BEATTY, J., having been interested as counsel in a similar case against the Uncle Sam Company, did not participate in the hearing of this cause.

Judgment affirmed.

DOUGHERTY ET AL. V. CREARY ET AL.

(30 Cal., 290. Supreme Court, 1866.)

Novelty—Equity. A court of equity, acknowledges and adapts itself to, the novelties which arise from the diversified transactions of men.

Abandonment of tailings and water. Water and tailings allowed to flow from a flume and abandoned, may be appropriated; but no obligation

rests upon parties who have so abandoned their water and tailings to continue so to do, even if persons below have, at expense, erected works to catch and appropriate such water and tailings.

Co-tenants, working a mine, are partners.

The majority in interest, and not the majority of persons, has the right of control in the working of claims where all parties can not agree.

Equity. The abuse of such right affords grounds for relief in equity.

HATCH & MCQUAIDE & GEORGE CADWALADER, for appellants.

W. C. BELCHER & J. O. GOODWIN, for respondents.

Appeal from the District Court of Yuba County, Tenth Judicial District.

The opinion states the facts.

By the Court, CURREY, C. J.

The plaintiffs and defendants are the owners of a valuable mining claim at Sucker Flat in Yuba county, known as the "Blue Point Claim," connected with which is a flume known as the "Blue Point Flume" of about seven hundred feet in length, extending through and from such claim toward the Yuba river. The same parties also own this flume. The undivided interests of the several persons constituting the parties to this action in said claim and flume are as follows: The plaintiffs, Dougherty and Lahey, each own one-seventh; the plaintiffs Beatty and Whalen jointly own one-seventh; the defendant Creary owns three-sevenths and the defendant Ackley owns one-seventh; and these several persons, at the time this action was commenced, had been working the claim and using the flume for the purpose for more than a year, and they and those under whom they hold the property had been carrying on the mining business there and using the flume in aid of the work for more than three years before then. Connected with the Blue Point Flume, at the lowest end of it, is another known as the "Cheek and Ackley Flume," extending from the point of connection toward the Yuba River about seven hundred feet, of which the same persons, except Beatty and Whalen, were the owners at the commencement of this suit, and for three years before then had been the owners in the following undivided proportions: Dougherty, Lahey, and Creary

each owned one-sixth, and Ackley three-sixths. Connected with the last named flume, at the lower end of it, is another, known as the Side Hill Flume, extending from the point of connection toward and to the Yuba River. The same persons who owned the Blue Point Claim and Flume were, at the commencement of this suit, and for three years before then had been, the owners of the Side Hill Flume in the following undivided proportions: Beatty, Whalen, and Ackley each owned one-twelfth; Dougherty, two-twelfths; Creary, four-twelfths and Lahey three-twelfths. These several flumes had, on the 30th of November, 1865, been used for more than three years by the parties interested in the working of said mining claim, and in washing and extracting the gold therefrom. The gold-bearing earth of the Blue Point Claim was of a quality that required its passage through flumes of the aggregate length of those named, in order to save and secure the gold therein, as about five-twelfths of the gold obtained by the process was from the Side Hill Flume. Adjoining the Blue Point Claim is another mining claim known as the "Union Claim," connected with and belonging to which is a flume known as the "Union Flume," extending from the Union Claim to the Yuba river. In its course downward it approaches near to the lower end of the Cheek and Ackley Flume. The defendant Creary was the principal owner of the Union Claim and Flume on the 30th of November, 1865. The plaintiffs had not at that time nor when this suit was commenced any interest therein. On the day last named, while the Blue Point Claim was being worked by the use of several flumes first mentioned, the defendant Creary, without the knowledge or consent of the plaintiffs, forcibly severed and destroyed the connection between the Cheek and Ackley Flume and the Side Hill Flume, and prevented the water freighted as it was with gold-bearing earth, from passing into the Side Hill Flume, by conducting it from the Cheek and Ackley Flume into the Union Flume. Upon discovering what had been done, the plaintiffs adopted measures by which the connection between the Cheek and Ackley Flume and the Side Hill Flume was restored, so that the water and gold-bearing earth was made to pass into the Side Hill Flume as it was wont before the defendant Creary changed its course. On the next day Creary, with a force sufficient to effect his

purpose, again destroyed the connection between the Cheek and Ackley Flume and the Side Hill Flume, and diverted the water and gold-bearing earth into the Union Flume. These acts, the plaintiffs allege in their complaint, were against their will and consent, and to their great damage and irreparable injury; and that by means of the alleged wrongs so committed by the defendant Creary, and which they charge he intends to continue by a perpetual diversion of the water and earth into the Union Flume, they will be deprived of and lose their proper share of the gold of the Blue Point Claim, which would be saved to them with others interested in the Blue Point Claim, if the water were permitted to run through the Side Hill Flume as the same had run before the commission of the alleged wrongs of which they complain. The defendant Ackley refused to join with the plaintiffs in their complaint against Creary, and therefore was made a defendant.

The foregoing facts, with others, are set forth in the stating part of the complaint, followed by a prayer for the equitable interposition of the court by injunction, to be directed to the defendant Creary, commanding and enjoining him, and his agents, servants, and employes and each and every of them, to desist and refrain from the continuance of the alleged wrongful acts complained of, and which the defendant Creary, as alleged, intended to continue; and further commanding and enjoining the same persons from interfering, in any manner whatever, with the free passage of all the waters used in working the Blue Point Claim, into and through the Blue Point, Cheek and Ackley and Side Hill Flumes, and from diverting the water into the Union Flume; and that, upon the final hearing of the cause, the injunction might be made perpetual. And the plaintiffs prayed for such other relief as might to the court seem equitable.

The complaint was verified and filed, and the judge of the district court made an order that the defendants show cause, if any they had, at a particular time and place, why the injunction for which plaintiffs prayed should not be granted. At the time and place appointed, the defendants appeared, and, for cause against the issuing of an injunction, laid before the judge affidavits showing that the Side Hill Flume was so dilapidated and worn out as to be unfit for the use for which

it was constructed. On the part of the plaintiffs, affidavits were also submitted, controverting in a great measure those of the defendants as to the condition of the Side Hill Flume, and showing that notwithstanding it was not in as good condition as when new, it was sufficient, with slight repairs, for the uses for which it was made.

The defendant Creary also submitted his own affidavit, setting forth that the Blue Point Mining Company, and the Cheek and Ackley Flume Company, and the Side Hill Flume Company, were separate organizations, independent of each other, and were formed at different times, and that some time about the month of June, 1864, the Blue Point Mining Company made an agreement with the owners of the Cheek and Ackley Flume Company, and also with the Side Hill Flume Company, by which the Cheek and Ackley Company agreed to pay the Blue Point Company five dollars per day for the privilege of taking and receiving from the flume of the last named company the water and gold-bearing earth and the gold therein that passed through the Blue Point Flume; and that the Side Hill Company agreed to pay to the Blue Point Company such sum as it was reasonably worth—to wit, ten dollars a day—for the privilege of taking and receiving from the Cheek and Ackley Flume the water and the gold-bearing earth and the gold therein which passed through that flume. That notwithstanding such agreements made with the flume companies, the owners of a major portion of the interests therein, respectively, wholly neglected and refused to pay the Blue Point Mining Company anything whatever, as they had agreed to do. He then states that the Blue Point Mining Company purchases the water with which to work their mining ground, and consequently have the entire management and control of the water and the gold-bearing earth and the gold therein which passed out of their flume, and that at the time the affidavit was made, by an agreement existing between the Blue Point Company and the Cheek and Ackley Company, the latter received into its flume the water and earth with the gold remaining therein from the Blue Point Flume, at and for the consideration of five dollars a day, with the right reserved to the Blue Point Company to control the water and tailings at the lower end of the Cheek

and Ackley Flume. He states further that the Nevada Reservoir Ditch Company, who own the Union Flume, take and receive the water and tailings from the Cheek and Ackley Flume by an agreement with the holders of the major part of the interests in the Blue Point Company, for which privilege the ditch company pay ten dollars per day; and he further deposes that unless the Blue Point Mining Company can have the management and control of the water and what it bears along with it, the whole way to the river, then all work by such company will have to be suspended, as all the gold secured in their claim and flume to the foot of it pays but little more than half the expenses of working the claim; that at divers and sundry times during the last three years the Blue Point Company had proposed and offered to buy the Cheek and Ackley and the Side Hill Flumes, or to consolidate the three companies, so as to make the interests held by any person equal in all the companies, and that all concerned in them were willing to do so but the plaintiffs Dougherty and Lahey, who for an unjust advantage to themselves refused so to do.

Each of the plaintiffs made an affidavit that no agreement, to his knowledge, was ever made on the part of the Side Hill Flume Company to pay the mining company anything whatever for the privilege of running the water and earth into and through the Side Hill Flume; and they also severally deposed that if there ever was any agreement made and entered into at any time between any of the owners of the Blue Point Company and the ditch company by which the Union Flume was to receive the water and earth from the Cheek and Ackley Flume, or otherwise, for ten dollars a day, or any other consideration, that then such agreement was made and entered into on behalf of the Blue Point Company by the defendants alone, without the consent or agreement of the plaintiffs thereto, who, with the defendants, were the owners of the said mining claim.

Upon hearing the plaintiffs' motion for an injunction, and the defendants' objections thereto, the judge, by order, refused to grant it, and from this order the plaintiffs have appealed.

Courts of equity.

The questions presented are perhaps novel in a court of equity, but we are not to decline their consideration for that reason. It is the common experience of the courts of this State to be called upon to deal with new and novel combinations of circumstances which are often extremely complicated and embarrassing. Still it is the duty of the court, as a court of equity, while keeping within the rules and principles on which its remedial jurisdiction is founded, to adapt its course of proceeding, as far as possible, to the existing state of things, and to apply its jurisdiction to all those new cases which from the diversified transactions among men, are continually arising, and to administer justice and enforce right for which there is no remedy save in a court of equity: *Taylor v. Salmon*, 4 Myl. & C. 141; *Walworth v. Holt*, Id. 635.

The several companies, that is, the Blue Point Mining Company, the Cheek and Ackley Flume Company, and the Side Hill Flume Company, seem to be, as companies, independent of each other, though many of the members of each are members of the others. The controversy which has arisen in this case is not between any two or more of the companies as distinct organizations, but between and among members of the several companies; and the first question to be ascertained is as to the right of the Blue Point Mining Company as an individual, to control for its own use and profit the water and tailings of its mine and mining operations; and if it be determined that such company has the right so to do, the order of the court refusing to grant an injunction must be affirmed as a matter of course.

It appears that prior to the year 1856, the miners of the locality which counsel denominate the Blue Point Basin, but which is now more commonly known as the Blue Point Mining Claim, were in the habit of discharging the water and earth from their mining claims above the head of a certain ravine through which the Cheek and Ackley Flume now passes. In this condition of things Cheek and Nutting, who had no interest in the mining claims in the basin, constructed the flume now known as the Cheek and Ackley Flume, as early as 1856, commencing at the head of the ravine and extending

down its course about seven hundred feet, for the purpose of taking up the waters and tailings at that date abandoned by the miners of the basin, and passing the same through their flume for their own profit. From that time to the commencement of this suit this flume was employed for the purpose for which it was originally constructed, and its owners have maintained an organization separate and distinct from the other companies named, sharing the expenses, losses, and profits of their enterprise in the ratio of their respective interests therein. In 1858, the Side Hill Flume was constructed for the purpose of taking up the earth and water which had passed through the Cheek and Ackley Flume, the head of which was at the foot of the last named flume, and from that point it extended to the Yuba River.

Abandonment of tailings and water.

In 1862, the miners of the basin consolidated their claims under the name of the Blue Point Mining Company, and from that time became the successors in interest of the rights of the miners whose claims were thus consolidated in a single company. So long as the miners of the basin and the Blue Point Mining Company abandoned the water and tailings which passed from their mining grounds, the Cheek and Ackley Flume Company had the right to take and appropriate the same to its own use, and upon the passage of the water and earth through that flume, the Side Hill Flume had the right to take and appropriate what so passed through the Cheek and Ackley Flume to its own use; but the respective rights of these flume companies were contingent and dependent on the fact of continual abandonment of the waters and tailings by the mining company, to whom the same belonged. If those owning and working the mining ground elected to abandon their property at a particular point and for a particular length of time, it did not therefore become obligatory upon them to continue to do so, even though the flume companies, encouraged by the circumstance of abandonment for a time, had incurred the expense of constructing flumes for the purpose of obtaining a profit from the water and earth so abandoned. When the Cheek and Ackley and the Side Hill Flumes

were constructed, their owners assumed the risk of loss by the miners ceasing to abandon the water and tailings from their mining grounds, and they can not justly complain because the Blue Point Mining Company adopts means by which it may obtain the full benefit of its mining enterprise.

The plaintiffs, as members of the Blue Point Mining Company, are interested as well as the defendants in having that company make large profits by the effectual working of the mine; and if it requires flumes of great extent to work the same to advantage, they are concerned as well as the defendants in employing the means which shall be adapted to the end to be attained. They can not be allowed to interpose a perpetual barrier to the profitable working of the mining ground by the company who own it, because they have an interest as members of another enterprise, depending for its success upon profits which the mining company is entitled to, if it chooses to reduce the same to beneficial account.

From the case before us it appears that the defendants own four-sevenths of the mining ground and water used in its working, and that the plaintiffs own the balance, and that the diversion of the water and gold-bearing earth from the Cheek and Ackley Flume to the Union Flume was at the instance of the defendants, for the benefit of the company. There is no complaint that ten dollars a day, which the Reservoir Ditch Company pay to the mining company, is not a just consideration for the water and tailings which is made to pass into the Union Flume; but the real ground of the plaintiffs' complaint is that, as principal owners of the Side Hill Flume, they suffer by the diversion, which deprives them of the profits which they had been accustomed to obtain by running through the Side Hill Flume the water and gold-bearing earth as discharged from the Cheek and Ackley Flume.

A majority in interest in a mining claim may control.

The parties constituting the Blue Point Mining Company are the owners of its property, as tenants in common, and in the working of the mine they are to be considered as partners: *Duryea v. Burt*, 28 Cal. 569. As the property can only be used in entirety, it is indispensable to the conducting of the

business of mining, that those owning the major portion of the property should have the power to control, in case all can not agree, otherwise the work might become wholly discontinued. As mining partnerships are not usually founded on the *delectus personæ*, the powers of the individual members of the concern are much more limited than are the powers of the individual members of a purely commercial or trading partnership; and for this reason the conduct of the partners holding the major portion of the property in a mining concern is to be most jealously scrutinized when complaint is made by the minority in interest of oppression. It might and often would work great inconvenience and damage to the minority in interest of a mining partnership, if the majority were allowed to do as they might deem to their own advantage, regardless of the rights and interests of the minority. But notwithstanding the danger of the abuse of power in such cases, what may be necessary and proper for carrying on the business of mining for the joint benefit of all concerned must be determined by those owning and holding in the aggregate the major part of the property. And if the powers which are thus attempted to be exercised are not necessary and proper for the success of the enterprise, those whose interests are imperiled or disastrously affected thereby have the right to resort to the courts for redress and protection.

If the defendant Creary has obtained an unjust advantage for himself by disposing of the water and tailings to the ditch company, in which he is largely interested, at ten dollars a day, the plaintiffs may have their suit to redress the wrong; but it does not appear by the case, as found in the record before us, that the compensation which the ditch company pays is not ample and adequate.

The order appealed from is affirmed.

BELL ET AL. V. THE BED ROCK TUNNEL AND MINING
COMPANY.

(36 Cal., 214. Supreme Court, 1868.)

Abandonment proved under general issue. Evidence of abandonment is admissible under general denial of title.

Intention to return. There must be a leaving of the claim, without any intention of returning or making any further use of it, to sustain the allegation of abandonment.

Range of testimony. Latitude should be allowed in cases of abandonment, analogous to the rule in cases of fraud.

Offer to purchase. An offer by the re-locating party, to purchase the title alleged to have been abandoned, and the refusal to accept such offer, is evidence upon the question of intent.

District rules—Forfeiture. The neglect to comply with a district rule does not operate to work a forfeiture, unless the district rule so provide.

The action was ejectment to recover certain placer ground, commenced December 13, 1867, resulting in a verdict in favour of the defendants, whose defense under the form of a general denial, was that the plaintiffs had abandoned their claims, with a special plea of forfeiture under district rules.

Appeal from the District Court, Fourteenth Judicial District, Nevada County.

A. C. NILES, for appellants.

SARGENT & REARDON, for respondent.

SANDERSON, J.

This is an action to recover the possession of certain mining ground called the Monte Christo Claims. The defenses, so far as they illustrate the grounds of the appeal, are: *First*—A denial of the plaintiffs' title; and *Second*—Forfeiture of their title under the mining rules and regulations of the district in which the Monte Christo Claims are situated. In the court below judgment passed for the defendant. The plaintiffs moved for a new trial, which was denied, and then appealed.

Two points are made by appellant. *First*—Error of the court in excluding certain testimony offered by the plaintiffs; and *Second*—in giving an instruction in relation to the question of forfeiture.

1. During the trial the defendant introduced testimony tending to show that in the fall of 1865 the plaintiffs, or their grantors, who had been theretofore working the Monte Christo Claims, ceased working the same, and removed their sluices, quicksilver and tools, and had not since worked upon or used the claims. In rebuttal of this testimony the plaintiffs offered to prove that in March or February, 1867, one Williams offered to purchase the Monte Christo Claims from them, and that they refused to sell; and that the offer was made by Williams on behalf of the defendant. To this the defendant objected, upon the ground of irrelevancy, and also upon the ground that no authority was shown in Williams to act in the matter on behalf of the defendant. The objection was sustained, the plaintiffs excepting.

The testimony before offered by the defendant, was relevant to two distinct defenses: 1st. The denial of the plaintiffs' title; 2d. Its forfeiture under the mining rules and regulations. It was relevant to the first, because it tended to prove an abandonment by the plaintiffs, long prior to the commencement of the action, and, therefore, that they had no title to the Monte Christo Claims at the date of the alleged entry of the defendant, for, although abandonment was not specially pleaded, evidence of abandonment was admissible on the question of the plaintiff's title. *Willson v. Cleaveland*, 30 Cal. 192. If, then, the defendant offered the testimony for the purpose, in whole or in part, of showing an abandonment, the testimony of Williams should have been received in rebuttal of the abandonment, for such was its tendency. As we held in *St. John v. Kidd*, 26 Cal. 263, in order to sustain an allegation of abandonment, it must appear that there was a leaving of the claim without any intention of returning or making any further use of it. The leaving being established, it is competent for the opposite party to show any acts explanatory of the leaving, which tend to show that it was not accompanied with an intent not to return. Thus, in *Richardson v. McNulty*, 24 Cal. 339, we held that a judgment roll in an action by Richardson to recover the same ground against other parties, was admissible upon the question of the intent with which he had left the ground, and tended to show that he had not left with the intent not to return. We also held the same doctrine in *Will-*

son v. Cleaveland, supra; and in conclusion, said: "Upon a question of abandonment, as upon a question of fraud, a wide range should be allowed, for it is generally only from facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove any fact or circumstance from which any aid for the solution of the question can be derived."

As already suggested, the testimony offered by the defendant was also relevant to the question of forfeiture, and had counsel stated that they did not rely upon it as showing an abandonment, but only as showing a forfeiture, the ruling of the court would not have been erroneous, for the question of intent is not involved in the question of forfeiture: *St. John v. Kidd, supra*. There is nothing in the transcript, however, showing that counsel did not rely upon abandonment as a defense, and we can not, therefore, say that the ruling was not erroneous.

2. The instruction to which exception is taken relates to the question of forfeiture, and was given in the following words: "If the jury believe from the evidence that an essential requirement of the mining laws and customs of the district in which the ground in controversy is situated is that a certain amount of work should be done on a mining claim, and that after sufficient work has been done to hold it, in order to entitle the holder or locator to suspend work for two years, he must give notice to that effect, and have it recorded and renewed every six months; and if the jury should further believe from the evidence that the plaintiffs, or their grantors, have not substantially complied with these requirements of the customs, they will find for defendant, provided they also believe that whilst the ground was subject to be jumped the defendant located it in accordance with the mining rules and customs, and has ever since held it in accordance with the same."

The objection taken to this instruction is that it directs the jury to find for the defendant if they find from the evidence that the plaintiffs had failed to comply with certain mining rules and regulations, without accompanying the same with a further charge, as to whether those rules and regulations declared a forfeiture as the result of such non-compliance. The failure of a party to comply with a mining rule or regulation

can not work a forfeiture unless the rule itself so provides: *McGarritty v. Byington*, 12 Cal. 426. There may be rules and regulations which do not provide that a failure to comply with their provisions shall work a forfeiture; if so, a failure will not work a forfeiture; hence, in charging a jury upon a question of forfeiture, the charge should be narrowed to such rules as expressly provide that a non-compliance with their provisions shall be cause of forfeiture. If there was no other point in the case, we might not feel justified in reversing the judgment on this ground, but the instruction is not so carefully guarded in the particular indicated as it should be. We find nothing in the remaining instructions which breaks the force of the appellants' objection to the one under consideration.

Judgment and order reversed, and a new trial granted. It is further ordered, that the remittitur be issued forthwith.

CROCKETT, J., concurring specially:

I concur in reversing the judgment on the first point discussed in the opinion.

Judgment reversed.

STRANG V. RYAN ET AL.

(46 Cal., 33. Supreme Court, 1873.)

Re-location of abandoned claim by co-tenant. * In May, 1853, the plaintiff and nine others located ten claims. In February, 1859, seven of the original locators with three strangers re-located, the names of plaintiff and two others of the original locators being omitted, and the names of strangers substituted. In 1861, a new district rule required the record of every claim to be renewed by a date certain, or be considered abandoned. For about two years neither party renewed their record, but after such period, and after the penalty of abandonment had become affixed to the claims, a renewal record was made by those claiming under the record of 1859, or by some of them with strangers. *Held*, that the location of 1853 was abandoned, without regard to whether the

*We do not think that all the *syllabi* in the original report of this case are supported by the opinion. The above *syllabus* may be a no more successful attempt. The opinion is difficult to comprehend, and when understood is seen to be rendered without citation of any authorities or any reference to the principles obviously involved in the contention.

record of 1859 was valid or invalid as against the parties omitted. (2). That the title was in those who made the third or renewal record, and (3). That as to abandoned claims the previous relation of co-tenancy would not prevent some re-locating for their own benefit without regard to the claims of others who had been their co-tenants.

Appeal from District Court, Second Judicial District, Butte County.

Ejectment to recover three undivided tenths of deep placer diggings. The plaintiffs claimed under a location made in 1858, and defendants under a later location. This later location had been made by a portion of the old locators who left out some of their associates, and took in others in their stead. The defendants, Ryan and Bresnan, claimed the three-tenths sued for. They were not among the original locators.

From the time of the renewal of location made by Ryan in December, 1863, the location was renewed in June and December of each year, up to the time this action was commenced.

The statement on motion for a new trial was settled December 2, 1871. The plaintiff recovered judgment in the court below, and the defendants Ryan and Bresnan appealed.

The other facts are stated in the opinion.

W. C. BELCHER, for appellants.

CREED HAYMOND, for respondents.

By the Court, CROCKETT, J.

This is an action to recover the possession of an undivided interest of three-tenths in certain mining ground situate at Cherokee Flat, in Butte county. The plaintiff claims that on the second day of May, 1858, he and nine other persons located, according to the mining laws then in force in that district, ten mining claims, including the ground in controversy; and that the location so made has been kept good ever since by a compliance with the requirements of the mining laws and regulations of that district. Since the original location, he has acquired the rights of two others of the locators, and, therefore, claims to be entitled to three-tenths of the ground. The local mining laws then in force in that district, provided that a notice describing the boundaries should

be posted on the premises, and should be recorded in the office of the district recorder. This ground was what is termed "deep diggings," and in respect to that class of mining ground, the local laws provided that after the posting and recording of the notice, the record would hold the claim good from the first day of November in each year until the first day of the succeeding May; but from the first of May to the first of November in each year, the ground must be worked one day in every five, if there was sufficient water; and, if not, the claim might be preserved by a notice posted on the ground, and to be renewed every ten days. But, in case of a failure to work the claim or renew the notices, as above stated, the claim was to be considered as abandoned. It appears from the proofs and findings that the original notice was posted and recorded on the second day of May, 1858; but no work was done on the ground until the fall of that year, when a shaft was sunk and the boundaries were marked out by several blazed trees and a pile of rocks. On November 1, 1858, the record of the claim was renewed, after which nothing was thereafter done to preserve the location unless the acts performed by the defendants and others under their location of February 21, 1859, shall be held to have inured to the benefit of the original locators; and thus preserved their claim. At the last named date, the defendants Ryan and Bresnan, together with nine other persons, seven of whom were original locators under the notice of May 2, 1858, posted a notice on the premises, claiming the ground for mining purposes; which notice was duly recorded. From this notice, the names of the plaintiff Strang, Ragget and Kennedy, three of the original locators, were omitted, and the names of William Ryan, Bresnan, John Lynch and Michael Ryan, were inserted, none of whom were original locators; and the court finds that the three omitted names were left out without authority and without the consent of said persons. Without determining whether this notice inured to the benefit of the three persons whose names were omitted, it will be assumed for the purposes of this decision that it had precisely the same legal effect as though their names had been inserted. There was evidence tending to prove that during the spring of 1859 a small amount of work was done upon the claim by the defend-

ant Ryan, and in the spring of 1860 a shaft was sunk to the depth of forty feet. During that year, and up to March, 1861, considerable work was done by the company, at which time the work was discontinued by the company as such, but it was agreed that any member might work the claim on his own account and for his own benefit. In pursuance of this authority, several of the original locators, and also the defendant Ryan, as the court finds, worked the claim up to the fall of 1863. But on the first day of December, 1861, a new code of mining laws went into effect in that district, which repealed and superseded the former laws. By the new law it was provided that all claims shall be recorded by the recorder of "this mining district on the first day of June and December of each year; provided, that after the first record a renewal of the same shall be sufficient; and all claims not so recorded or renewed within ten days after the said first day of June and December of each year, the same shall be considered abandoned." No provision is made for the working of the claim as a condition for preserving the location. All that is required is that the claim shall be recorded and renewed as above provided; and the court finds that "the claims were kept alive and held from the tenth day of December, 1863, to the ninth day of December, 1869, by renewing and recording the same in the office of the Mining Recorder for said district, in accordance with the mining laws of said district." But there is nothing either in the findings or the evidence tending to show that the record of the claim was renewed at any time between the first day of December, 1861, when the new laws took effect, and on the tenth day of December, 1863. It is clear, therefore, that whatever rights were acquired either under the notice of May 2, 1858, or under that of February 21, 1859, were lost by a failure to renew the record between December 1, 1861, and December 10, 1863. It results that if either of the parties have any right to the ground under the local mining law, it must have been acquired in virtue of the proceedings had on and subsequent to the tenth day of December, 1863, on which day the defendant Ryan caused to be recorded in the office of the district recorder a notice in the following words:

"December 10, 1863, Wm. Ryan orders the following renewal: This is the Irish Co.: Notice—We, the undersigned, claim

ten mining claims on Sawmill Ravine, commencing at this notice on a pine tree, running a northeasterly direction five hundred feet, and running north from this notice two hundred feet, running into Sugar Loaf Mountain five hundred feet, and from thence to the center of the Sugar Loaf Mountain, and five hundred feet along the ravine and the south line by Gregory's old cabin; and we claim an outlet from said claims, Cherokee Flat.

(Signed:)

"JAMES LYNCH, three claims.

"WILLIAM RYAN, two claims.

"JOHN EVERETT, two claims.

"MICHAEL BRESNAN, one claim.

"JOHN TUHEY, one claim.

"JOHN O'KEEF, one claim."

This was evidently intended as a renewal of the old notice and not as an original location. It is expressly declared on its face to be a renewal, and the mining law then in force provided that "no miner shall be entitled to hold more than one claim by location or preëmption at the same time." If it was effectual as a renewal for any purpose after the claim had lapsed by reason of a failure to renew the record for the preceding two years, it was a renewal made by and for the benefit of those whose names are appended to it, only three of whom were original locators under the notice of May 2, 1858. This renewal was made by Ryan, and several of the subsequent renewals by Bresnan, who were strangers to the location of May 2, 1858, and in nowise in privity with the plaintiff or those under whom he claims. They are in no sense the agents of the original locators, or any of them, in causing the renewals to be made, but were acting for themselves and their associates, whose names were appended to the notice of December 10, 1863. In authorizing a renewal of the record as a method of preserving a location, the local mining laws contemplated a renewal to be made by the parties in interest, or their privies, and not by a stranger, and particularly by one claiming in hostility to them. If, therefore, the renewal of December 10, 1863, and those subsequently made, were operative for any purpose, they inured to the benefit of those who authorized or caused them to be made, and not to the benefit of the plaintiff or his grantors. It results from these views that the plaintiff failed at the trial to estab-

lish a title to any portion of the mining ground in controversy.

It is insisted, however, on behalf of the plaintiff, that we can not review the evidence, for the reason that the statement on the motion for a new trial contains no sufficient specification of the particulars wherein the evidence does not justify the findings and judgment. But the first, second, third, fourth, sixth, seventh, eighth, and thirteenth specifications are certainly not obnoxious to this objection. Each of them specifies a particular fact found by the court, which it is alleged was not supported by the evidence, and in respect to all the remaining specifications, each of them points to a separate, specific finding, confined to one or two facts, and avers that it was not justified by the evidence. We think this was a sufficient specification under section one hundred and ninety-five of the Practice Act.

Judgment reversed, and cause remanded for a new trial.

Mr. Justice BELCHER, being disqualified, did not participate in the decision.

MORENHAUT ET AL. v. WILSON ET AL.

(52 California, 263. Supreme Court, 1877.)

Intent negatived—Leaving tools—Indian hostilities. The fact that the locators of a claim were driven away by hostile Indians, leaving their tools at another mine in the vicinity, and did not return, partly “because of the necessary expenditure of money, and also because they thought that they had performed sufficient work thereon to entitle them to hold it,” *held* [in terms without analysis], to be substantially a negation of the intent to abandon.

Pleading. Forfeiture must be specially pleaded. Abandonment may be proved under the general issue.

Non-joinder of all co-tenants. Plaintiffs being tenants in common, may maintain “an action for the recovery of the land without joining their co-tenants.”

Insufficient findings. The findings in this case, specially upon the question of possession, *held*, not sufficiently definite to justify judgment for either party.

Location notice without staking boundaries, does not amount either to constructive or actual possession.

GEORGE C. GIBBS and JOHN D. BICKNELL, for appellants, who were plaintiffs below.

L. D. WILSON, and H. C. ROLFE, for respondents, defendants below.

The action was ejectment in the District Court of the Eighteenth Judicial District, in the county of San Bernardino.

Judgment below was entered for defendants upon the following findings:

1. That in November, 1866, E. B. Frink, or some other person, as agent for the persons whose names are attached to the notice of location, a copy of which is attached to the affidavit of S. B. Cox, filed in this cause, posted said notice on a tree, at or near the shaft or cut on the lead or mine in controversy.

2. That plaintiffs are, and were at the date of such location, citizens of the United States.

3. That said Frink, as superintendent, and in the employ of those whose names are attached to said notice of location, entered upon said mine, under said notice, and sank a shaft thereon from seven to nine feet deep, in the fall of 1866.

4. That said Frink and the laborers employed by him, left said mine in the fall of 1866 on account of immediate danger from hostile Indians, and the Indians stole the horses of the company and committed other depredations in the vicinity of said mine.

5. That said Frink, as superintendent as aforesaid, returned to said mine early in 1867, with men and tools to prosecute work on said lead, and continued to work on said lead until February, 1867, and made a cut about twenty-three feet long through lime rock in the mountain toward the lead, and sunk a shaft thereon.

6. That said company paid said Frink during the fall of 1866, and up to February 1867, the sum of one thousand dollars, to be expended in working and developing said mine.

7. That said Frink and company left said mine in February, 1867, being driven away by Indian hostilities. That they left all their tools at the Morongo Mine, at a distance of between four and five miles. That neither the said Frink nor

any of said plaintiffs, nor any one for them, returned to said mine from February, 1867, until the year 1873, nor have they since performed any labor upon said mine.

8. That the reason said plaintiffs have not returned to said mine or worked the same, was on account of supposed Indian hostilities, and in part because of the necessary expenditure of money, and also because they thought that they had performed sufficient work thereon to entitle them to hold it.

9. That at the time of said location, to wit, in the fall of 1866, and until the entry thereon by defendant McFee, in December, 1872, said mine was situated in what was known as the Holcomb Valley Mining District, and that by the laws and regulations of said District it was necessary to perform three days' work annually upon each claim of two hundred feet, in order to hold the same.

10. That from the year 1868, up to and including the year 1873, parties were traveling the country in which said mine is located, prospecting, and at different times during said years miners were engaged in the vicinity of said mine working and developing mines, and bands of sheep and horses were grazed at or near the vicinity of said mine, and during the year 1869, up to and including the year 1873, there was nothing to prevent miners, with the exercise of reasonable prudence and caution, from working upon and prospecting mines at and in the vicinity of said mine.

11. That in December, 1872, defendant John E. McFee and one P. Shelly entered upon the said mine, and on the 12th day of January, 1873, duly located the same according to the rules and regulations of the Arlington Mining District, in which the same was then situated; that in locating said lead they described the lead as commencing at said shaft or cut, and running thence southeasterly seven hundred and fifty feet, and from said cut northwesterly seven hundred and fifty feet, and distinctly marked the same upon the ground from said cut ten degrees south of east seven hundred and fifty feet, and from said cut or shaft ten degrees north of west seven hundred and fifty feet; that they claim three feet upon the surface on the sides of said mine or lead for the purpose of working the same, and placed distinct and visible marks at each corner and also at the middle, or on each side, opposite said shaft; that in

June, 1873, they had the same entered upon the records of the Lone Valley Mining District, in which the same was then situated, and duly complied with the rules and regulations of said last-named district in regard to boundaries and location.

12. That in April, 1873, defendant McFee and P. Shelly partitioned said mine, whereby, by instrument of writing between them in due form, the east seven hundred and fifty feet was set apart, partitioned and conveyed to defendant McFee, and the west seven hundred and fifty feet thereof was set apart, partitioned, and conveyed to said P. Shelly; and that the defendant L. B. Wilson has, by conveyance in writing in due form, become the owner of the interest of said Shelly in and to that portion so set apart and conveyed to him.

13. That defendant Wilson, and McFee, and the grantors of said Wilson, have at all times complied with and fulfilled the requirements of all laws, rules, and regulations of the districts in which said mine has been situated since their entry thereon; performing labor thereon each year thereafter, and have sunk a shaft thereon, through hard limestone, to the depth of thirty-four feet, and have, ever since December, 1872, been in possession and occupied said mine.

14. That in July, 1873, and again in May, 1874, plaintiffs demanded of defendant McFee the possession of said mine, which was refused.

Copy of the Location Notice.

“NOTICE.—To all whom it may concern. Notice is hereby given, that we, whose names are hereunto affixed, have this day located, and by these presents do locate and claim two hundred (200) feet each on this mineral lode, lead, or vein, supposed to contain copper and other minerals, to be known as the Piñon Valley Lead, situated in the range of mountains northeast of the Piñon Valley, and commencing at this notice, (on a Piñon tree) and extending three thousand (3,000) feet along the lead or vein, supposed to be in a northeasterly direction, and that we intend to work the same according to the laws of the Piñon Valley District.

“Signed: George O. Tiffany, 200; E. B. Frink, 200; Charles Jenkins, 200, S. B. Cox, 200; Jesus Garcia, 200; Dr. W. C.

Franklin, 200; Osborn & Kohn, 200; O. N. Potter, 200; J. A. Morenhaut, 200; W.K. Potter, 200; W. W. Ward, 200; Daniel Waite, Jr., 200; Edmunds, 200; George W. Klein, 200.

"PINON VALLEY, California, November 20th, 1866.

"(Endorsed) Filed June 24th, 1874.

"SYDNEY P. WAITE, Clerk."

Plaintiffs appealed.

NILES, J.

The plaintiffs, by their entry, and by the work done upon the shafts and cut, had undoubtedly a prior possession of a portion of the mining claims in controversy. This possession would entitle them to recover at least that portion of the mine from the defendants, who were subsequent locators, unless the plaintiffs had either abandoned their possession prior to the entry of the defendants, or had forfeited the claim by a non-compliance with the rules or regulations of the miners of the vicinity.

1. It is not found that the plaintiffs abandoned their claims. On the contrary, it is found that they were driven away by hostile Indians, leaving their tools at another mine in the vicinity, and did not return prior to the location by the defendants, partly on account of a supposed continuance of Indian hostilities, and partly because of the required expenditure of money, and because they thought they had performed sufficient work upon the mine to entitle them to hold it. This finding substantially negatives that intent on the part of the plaintiffs necessary to constitute an abandonment: *Richardson v. McNulty*, 24 Cal. 345; *Bell v. Bed Rock T. & M. Co.* 36 Cal., 215.

2. There is no direct finding of the fact of a forfeiture of the claims by the plaintiffs. It was found in substance, that during a certain period immediately prior to the entry by the defendants, the plaintiffs had failed to perform the work which the laws and regulations of the mining district declared to be necessary in order to hold the claims. If this could be construed to be a finding of a forfeiture under the mining laws, we should hold it to be a finding without the issues made by the pleadings.

We have held that an abandonment of mining claims by a plaintiff may be shown by the defendant under the general issue: *Willson v. Cleaveland*, 30 Cal. 200.

The instant an abandonment takes place, a vacancy in the possession occurs. The right of possession of the former occupant is absolutely lost, and the land becomes *publici juris*, and free to the occupation of the next comer, whoever it may be. But the occupant of mining claims does not lose his right of possession absolutely by a failure to comply with one or more of the local mining laws, although these laws declare a forfeiture as the result of such non-compliance. He may still remain in possession under his original location, and is entitled to the possession until such time as another shall enter and locate the ground in the manner prescribed by the mining laws, and thereby avail himself of the default of the prior occupant. A defense based merely upon forfeiture does not involve a denial of the plaintiff's possession or right of possession at the date of the defendant's entry. It is analogous to a plea in confession and avoidance—admitting possession and a right of possession in the plaintiff, which would have continued in him but for the defendant's entry and location, which by virtue of the mining laws, terminated the right. We think this is a special issue, and can be presented only by a special plea.

In the case of *Bell v. Brown*, 22 Cal. 681, expressions were used seemingly at variance with the doctrine here announced. But it was unnecessary for the purpose of that decision to consider—and the court evidently did not consider—the obvious and important distinctions between an abandonment and a forfeiture under the local mining law.

3. It is urged by the respondents that the findings do not show that all of the plaintiffs had acquired the titles of the original locators. But it appears that some of the plaintiffs were among the original locators of the claims. As tenants in common with the other locators, they could maintain an action for the recovery of the land, without joining their co-tenants with them. If other persons were improperly joined as plaintiffs, the objection should have been taken by the answer.

4. The appellant asks for a judgment upon the findings. The only acts of location upon the part of the plaintiff, found by the court, was the posting of a notice upon a certain tree, upon the mine, claiming three thousand feet from the notice along the lead, in a supposed northeasterly direction. It does

not appear that the boundaries of the claim were designated by any visible monuments or marks upon the ground, other than the tree upon which the notice was posted. It is evident that an actual possession of the entire three thousand feet described in the complaint can not be successfully claimed by virtue of this location. Nor does it appear from the findings that the plaintiffs had that constructive possession which arises from a location made in accordance with the customs or regulations of miners. No local regulations, and no customs or usages, either local or general, affecting the mode or manner of locations, are found by the court. The extent of the actual possession of the plaintiffs by means of their works upon the ground, is also left entirely undetermined. We have not, therefore, the data upon which to order judgment upon the findings, and the case must go back for a new trial.

Judgment reversed, and cause remanded for a new trial.

STONE V. THE GEYSER QUICKSILVER MINING COMPANY.

(52 California, 315. Supreme Court, 1877.)

Belief. The fact that a re-locator believed the ground to be abandoned can not be considered as evidence of abandonment.

Animus revertendi. There can not be abandonment except where there has been previous possession, and then the *animus revertendi* is the simple test. The inducement which keeps alive the purpose to return can not affect the question of abandonment.

Presumption of fact from fact. A jury can not rightfully be told that they are authorized to find the fact of abandonment from the existence of other facts which do not necessarily raise a presumption of, but only tend to prove an abandonment.

DAVID S. TERRY, JOHN NUGENT, and CALHOUN BENHAM, for appellants, who were plaintiffs below.

Appeal from District Court, Seventh Judicial District, County of Sonoma.

The action was ejectment for quicksilver mining claims.

The testimony tended to show that the plaintiff with others,

had located the ground for quicksilver mining in 1860, and entered into possession and performed labor.

Plaintiff had acquired the title of his co-locators, and brought this action in 1874. The defendants had entered upon the same ground about 1871, for the same purpose. One of the issues was whether prior to the defendant's entry the claims had been abandoned by the plaintiff. The defendants had judgment, and the plaintiff appealed from the judgment and from an order denying new trial.

The other facts are stated in the opinion.

By the COURT:

The district judge charged the jury: "In examining the question of abandonment, the jury should consider all acts of the parties charged with abandoning, satisfactorily proven to them, and manifesting the absence of an intention in good faith to keep up and preserve any right of possession they may have acquired.

"Abandonment is a question of intention, to be gathered from the facts of the case, the acts of omission as well as commission of the party relying on prior possession alone, and every man is conclusively presumed to intend the natural and probable consequences of his own acts. The lapse of time is a material element in abandonment, as is also the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises and re-locating.

"When it is said that a party does not abandon if he intends to return, it is meant that he intends in good faith to return and develop his mine, and appropriate it to its proper uses.

"If the jury believe from the evidence that the plaintiff or his grantors left the premises in controversy vacant and unoccupied for a series of years, and during that time exercised only casual acts of ownership upon the claims at long intervals, and that during that time no actual work was done toward working or developing the mine, either upon or in proximity to the claims, and that the defendants, finding the ground apparently abandoned, entered upon and located the same in pursuance of the mining laws of the district and the laws of Congress, and have continued to comply with said laws, and have, in good faith, reasonably believing said ground

had been abandoned, expended large sums of money in developing said mines, then you are authorized to find the fact of abandonment."

The charge can not be sustained.

The jury were informed that they were at liberty to rest a finding of abandonment—in part, at least—upon the circumstance, if proved, that defendant "reasonably believed" the mining ground to have been abandoned. It is impossible to determine how far the jury were influenced to find an abandonment by the evidence tending to show the *belief* of the members of the corporation defendant.

But, independent of this, the charge was erroneous in suggesting that there might be an intention to return to the personal occupation in bad faith. The question of abandonment can never arise except where there has been possession, and then the *animus revertendi* is the simple test. The inducement which keeps alive the purpose to return, can not affect the decision of the question of abandonment.

The charge was also erroneous in that the court informed the jury that a presumption of fact was created by the proof of other facts. Such was, in effect, the instruction that, if certain facts were established, the jury would be authorized to find an abandonment. It is erroneous for the court to charge that the existence of facts developed in the evidence, "raises a reasonable presumption" of the existence of another fact: *People v. Walden*, 51 Cal. 588. To say to the jury that they would be authorized to find a fact because of the existence of another, is but saying, in another form, that the existence of the latter raises the reasonable presumption of the existence of the former, since the jury can find the former only as a presumption from the existence of the latter.

It is a very different thing from saying that one fact tends to prove another. It is the duty of the court to pass upon questions as to the admissibility of evidence, but it is solely the province of the jury to determine questions of fact, and this includes the duty of ascertaining the existence of a fact from the existence of other facts, without the aid of any rule of law: 1 Greenl. on Ev. 48.

Judgment and order reversed, and cause remanded for a new trial.

SEYMOUR V. WOOD ET AL.

(53 California, 303. Supreme Court, 1878.)

New trial. The plaintiff in ejectment for a mining claim obtained a verdict, although the evidence clearly established that he had abandoned the claim: *held*, that the verdict should have been set aside.

J. N. THORNE, for appellants, who were defendants below.

HUPP & CROWLEY, for respondent, who was plaintiff below.

Appeal from District Court of Nevada County, Fourteenth Judicial District.

The plaintiff admitted, on cross-examination, that for several years he had followed mining in Mexico, and during that period had not worked the claim in controversy. The machinery had been removed. The defendants were in possession under a patent, to the issue of which the plaintiff had made no opposition, although aware of the application. *The question of abandonment¹ was submitted to the jury*, and the jury returned a verdict for the plaintiff, upon which judgment was rendered. Defendants moved for a new trial, which being denied, they appealed.

By the COURT:

The verdict of the jury is attacked on the ground that the evidence affirmatively established that plaintiff had abandoned the premises in question. Upon looking into the record, we are of opinion that the verdict should have been set aside and a new trial granted on that ground. The abandonment was clearly established at the trial.

Judgment and order reversed, and cause remanded for a new trial. Remittitur forthwith.

¹NOTE. Such an issue was manifestly irrelevant and trifling, if the defendant held under a patent: *Ferris v. Coover*, 10 Cal. 591.

DODGE V. MARDEN ET AL.

(7 Oregon, 456. Supreme Court, 1879.)

Water rights excluded in patent. Where patent issues reserving the water rights mentioned in § 2339, U. S. Revised Statutes, the claimant of such rights continues to own them; but his right may become divested by abandonment.

Non-user, not abandonment. Such water right can not be divested by *non-user* alone short of the period of the Statute of Limitations relating to real property.

Abandonment, in connection with sale. The sale of mining claims to a stranger is not necessarily an abandonment of the water used on such claims.

Abandonment defined—How affected by statute. The word abandon, means to desert or forsake. It implies an action of the will and an intent. Such intent may be inferred from the acts and declarations of the party to be charged. And in addition to actual abandonment, the statute requires it to be followed by non-user for one year, before the original owner is deemed to have lost all title therein.

Appeal from Jackson County.

The action was brought to restrain respondents from using a certain water ditch, and for other relief.

Appellant owns the real estate over which the ditch runs. This ditch was constructed in 1866, by one Ralls, before title passed from the United States. Respondents are licensees of Ralls. Appellant claimed that the water rights of Ralls had become lost by abandonment. The facts relied on to prove such abandonment are stated in the opinion.

E. B. WATSON AND J. A. STRATTON, for appellant.

A. C. JONES and STRAHAN & BURNETT, for respondents.

BOISE, J. It being admitted in the pleadings that the appellant is the owner in fee of the land described in the complaint over which the ditch complained of is constructed, he would have the right to have the respondents restrained in the use of it to his damage, unless they show that they are using it by some right which in law subjects the land to some right in the respondents to convey the water over the land of the appellant.

The respondents claim that one M. V. Ralls, under whom they occupy and use this ditch and water, has such a right, vested in him by virtue of an act of Congress of July 26, 1866, section 2339 of the Revised Statutes of the United States, which provides: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals, for the purposes herein specified, is acknowledged and confirmed. But whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

Section 2340 provides as follows: "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, etc., acquired under the preceding section." The first question is: Did Ralls acquire such a right? It is admitted that he became the owner of this ditch and water right and occupied and used it prior to 1866, and that he, or persons under him, used it for conveying water for mining purposes in 1866-7. The title to the land now owned by the appellant was then in the United States. The patent to it from the United States to the appellant reserves the water rights mentioned in section 2339, above quoted, so that Ralls would still be the owner and entitled to use this ditch unless he has lost such right by abandonment. The second and important question in this case is, has Ralls lost this right by abandonment? It is claimed by the appellant that the fact that he did not use it for a period of about ten years is sufficient evidence to prove an abandonment. The right being one belonging to real property, could not be lost by non-user alone, short of the period for the limitations of actions to recover real property, which is twenty years: 1 Nev. 188; 6 Cal. 510; 10 Id. 181. But such a right might be shown to have become extinguished by an act of abandonment, showing that Ralls had intentionally abandoned the same. It is claimed by the appellant that the bill of sale

made by Ralls of three mining claims to a Chinaman, proves that he had abandoned all claim on this ditch.

The following is the bill of sale, as exhibited in the testimony of Ralls: "Know all men by these presents, that I do this day bargain and sell to Yack, three mining claims, situated on Kane creek, three hundred yards in length.

"Said claims are creek claims. Said claims are bounded on the northwest by Yack's, and running southeast three hundred yards to a stake, for which he pays the sum of ninety-five dollars. Said claims are entitled to all the water below the two upper ditches.

"October 4, 1864."

Nothing is said in this instrument about the ditch in question, and the evidence of Ralls shows that these claims were located along the creek above the head of the ditch in question, that is, the third ditch, and below the head of the second ditch, and above its lower outlet.

They were along by the side of the second ditch, and it does not appear that they were worked by the water of either of the ditches. They are described as creek claims. These claims might have been worked, and any water that was not used up by them, might have flowed on and entered the third ditch, the ditch in question, without interfering with their operations. It appears from the testimony that this ditch was used by persons, with the consent of Ralls, in 1866-7, which was after the date of this instrument; and we do not see from the testimony how the use of the ditch in question, would affect the claims sold to Yack, for he had the water first, and this ditch could only receive the surplus water that ran on past their claims. We think this instrument, and the circumstances under which it was given, as proven, does not prove an abandonment by Ralls.

No abandonment is proven by the testimony in this case, when considered without reference to the statute of Oregon, which we will next consider in connection with the facts found in this case. The statute referred to is section 7 of the act relating to mines and mining claims, page 685, and is as follows: "That ditches used for mining purposes and mining flumes permanently affixed to the soil, be and the same are hereby declared real estate during the time the same shall be used

for that purpose, provided, that whenever any person, company or corporation, being the owner or proprietor of any ditch, flume or water right, have or shall abandon the same, and who shall for one year thereafter cease to exercise ownership over said water right, ditch or flume; and every company, corporation or person who shall remove from this State, with intent or purpose to change his or their residence, and shall remain absent one year without using or exercising ownership over such water right, ditch or flume, by a legally authorized agent, shall be deemed to have lost all title, claim or interest therein."

The word abandon means to desert or forsake. In maritime law it means to relinquish to underwriters all claim. It is "used of an insured person who gives up all claim to the property covered by the policy which may remain after the loss or damage by a peril insured against." There can be no abandonment without some action of the will, and an intent to abandon: 1 Nev. 188. Such intent may be inferred from the declarations and acts of the party charged with an abandonment, because it is only by the declarations and acts of persons that we infer their intention, and in this case, as before suggested, no abandonment has been proven.

We must construe the word abandon in the statute, according to its ordinary signification; and it would be necessary in order to show that Ralls had lost his right to the ditch in question, by this statute, to show first that he had given up all claims to it, which would be an abandonment, and then that after such abandonment he had ceased for one year to exercise any acts of ownership over it. This is the natural and literal construction of the statute, and such construction will accomplish the intention of the legislature, which seems to have been to make mining rights stable, and give to them the character of real property. In construing them and the evidence necessary to show that these rights have been acquired, transferred or lost, it will be necessary to apply the rules which govern similar transactions in relation to real property.

Entertaining these views of the law and evidence in this case, we have found no error in the conclusions and decree in the circuit court, and its decree will be affirmed with costs.

Affirmed.

1. Abandoned construed, in a lease, as equivalent to "forfeited," or "void:" *Bowyer v. Seymour*, 13 W. Va, 12; *Post* LEASE.
2. Abandonment by failure to use water, and by selling out at nominal price: *Davis v. Gale*, 32 Cal. 26; *Post* DITCH.
3. Abandonment of waste water: *Woolman v. Garringer*, 1 Mont. 535; *Post* APPROPRIATION; *Eddy v. Simpson*, 3 Cal. 249; *Post* WATER.
4. By failure to work under district rules: *Depuy v. Williams*, 26 Cal. 309; *Post* EJECTMENT.
5. Defective sale construed as amounting to abandonment: *Barkley v. Tieleke*, 2 Mont. 59; *Post* DITCH.
6. Quitting work by licensee: *East Jersey Co. v. Wright*, 32 N. J. Eq. 248; *Post* LICENSE.
7. Abandonment always associated with possessory titles: *Ferris v. Coover*, 10 Cal. 631.
8. Mines abandoned cease to be opened mines: *Gaines v. Green Pond Co.*, 32 N. J. Eq. 86; *Post* WASTE.
9. Change of location no abandonment: *Gleeson v. Martin White Co.*, 13 Nev. 442; *Post* LOCATION; *Weill v. Lucerne Co.*, 11 Nev. 200; *Post* CONVEYANCE.
10. Lessee abandoning, not entitled to notice to quit: *Horner v. Leeds*, 25 N. J. Law, 106.
11. Abandonment of prospecting contract: *Johnstone v. Robinson*, 2 Colo. L. R. 110; *Post* PROSP. CONTRACT.
12. Abandonment of tailings: *Jones v. Jackson*, 9 Cal. 237; *Post* TAILINGS.
13. Abandonment by lessee: *Karns v. Tanner*, 66 Pa. St. 297; *Horner v. Leeds*, 25 N. J. Law, 106; *Kreutz v. McKnight*, 53 Pa. St. 319; *Post* FORFEITURE; *McDowell v. Hendrie*, 67 Ind. 513; *Post* LEASE.
14. Abandonment does not involve estoppel: *Marquart v. Bradford*, 43 Cal. 526; *Post* ESTOPPEL.
15. Abandonment by failure to complete location: *Murley v. Ennis*, 2 Colo. 300; *Post* PROSP. CONTRACT; *Myers v. Spooner*, 55 Cal. 257; *Post* LOCATION.
16. Abandonment not presumed from lapse of time: *Partridge v. McKinney*, 10 Cal. 181; *Post* ADVERSE POSS.
17. Abandonment a question of intention: *St. John v. Kidd*, 26 Cal. 263; *Post* DISTRICT RULES.
18. Non-user no implication of abandonment: *Seaman v. Vawdrey*, 16 Ves. 390; *Post* RESERVATION.
19. Absence of tenant in common. Refusal to pay assessments: *Waring v. Crow*, 11 Cal. 366; *Post* EJECTMENT.
20. Abandonment need not be specially pleaded: *Willson v. Cleveland*, 30 Cal. 200.
21. See, generally, cases printed under ANNUAL LABOR and under FORFEITURE.

THE WESLEY COAL CO. v. HEALER.

(84 Illinois, 126. Supreme Court, 1876.)

Mine owners' liability. A statute of the State of Illinois provided that under certain circumstances, mine owners should construct escapement shafts from their mines, and for a willful violation of the act should be liable for any direct damage occasioned thereby, and in case of loss of life a right of action should accrue to the widow of the person killed.

A coal company worked three coal veins through a single shaft, in violation of the statute. A fire occurred in the main shaft above the second level where H. was at work, and in the attempt to escape he fell to the third level and lost his life. *Held*, that the company was liable to the widow of H., though the fire was accidental, and though there was no real danger, the alarm on the part of H. being natural in the absence of any escapement shaft. A party having given another reasonable cause for alarm, can not complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility for damages resulting from the alarm.

Appeal from the Circuit Court of Peoria County, the Hon. J. W. COCHRAN, Judge, presiding.

COHRS & RIDER, for appellant.

PUTERBAUGH, LEE & QUINN, for appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court.

There came into force, on the 1st day of July, 1872, a statute of the State of Illinois, by which, among other things, it was enacted that "In all coal mines * * * in operation prior to the 1st day of July, 1872, which are worked by or through a shaft, * * * in which more than fifteen miners are employed, if there is not already * * * a communication between * * * said coal mine and some other contiguous mine, there shall be an escapement shaft, making at least two distinct means of ingress and egress for all persons * * * permitted to work in such coal mine. * * *

Such escapement shaft, or other communication with a contiguous mine as aforesaid, shall be constructed in connection with every vein or stratum of coal worked in such coal mines; and

the time to be allowed for such construction shall be one year for each one hundred feet in depth of such escapement shaft so to be constructed, or fractional part thereof. * * * For any injury to person or property occasioned by any willful violations of this act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any *direct damages* sustained thereby; and in case of loss of life *by reason* of such willful violation, or willful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, * * * for a like recovery of damages for the injuries sustained by reason of such loss of life."

The appellant in November, 1874, was the owner of mines called the Hope Mines. These mines, before July, 1872, were in operation, and consisted of one main perpendicular shaft communicating with three several veins of coal, the first some seventy feet below the surface of the earth, the second some sixty-five to seventy feet lower than the first vein, and the third some one hundred and twenty feet lower than the second vein.

In November, 1874, the appellant was not working the first or upper vein, but, was working both the second and third veins. There was an escapement shaft which had been sunk to the first vein, and which, by the excavations on that plane, communicated with the main shaft. There was no escapement shaft from either the second or third vein, and there was no communication from either of these veins, connecting with any contiguous mine or mines, and there never had been. The only mode of ingress and egress to or from the second and third veins was by way of the main shaft. The second vein was less than two hundred feet below the surface of the earth, and more than two years had elapsed since the statute came into force.

In November, 1874, notwithstanding the want of the required second mode of ingress and egress required by the statute, the appellant was working in the second vein more than fifteen men, in direct violation of the statute. Appellant was, at the same time, working a number of men in the third vein.

In this condition of affairs, some combustible material in

connection with the "up-cast"(or flue provided to conduct the smoke from the furnace operated for ventilation) took fire, and by reason of the burning, a quantity of smoke was produced and thrown into the main shaft above the second vein. The devices for ventilation were such that, by the currents of air, this smoke was carried (besides to other places) down the main shaft, and through some of the passages and chambers of the second vein, causing great alarm among the miners, and darkening the passages. The miners generally rushed to the main shaft, that being the only possible avenue of escape.

The husband of appellee, at that time, was a laborer in the second vein. The evidence tends to show that he, among others, rushed toward the main shaft, in the midst of the general alarm, and that, by reason of the darkness, or from some other cause incident to the affair, he fell down the main shaft to the bottom of the third vein, and thus lost his life.

This is an action, brought under that statute, by the widow of the deceased.

Appellant insists that the fire in the "up-cast" was not the result of any fault of the company; and without fault in this respect, appellant can not be charged with the consequences of the fire.

This position is not tenable. The evidence as to whether the fire was purely accidental, or the result of improvidence on the part of appellant, is contradictory, and does not clearly settle that question. But, assuming that the fire was purely accidental, and not the result of any fault on the part of appellant, still upon the conceded facts of the case, the appellant is plainly liable.

The statute was intended to provide against just such unavoidable accidents in mines, by which many valuable lives had been lost. The company confessedly had failed to construct the escapement shaft required by the statute, and, confessedly, with a full knowledge of the want of any second mode of escape from that vein, continued to work more than fifteen men in that vein. This renders the appellant liable for all direct damages sustained by reason of the want of this second mode of escape. The only remaining question is, whether the death of appellee's husband can properly be said to be one of the direct consequences of the want of an additional escapement

shaft. The jury have found, from the evidence, that it was one of the direct consequences, and we think the evidence in this regard fully authorized that finding.

It is said there was no real danger; that the fire was readily extinguished, and had the men stayed at their work, they would have suffered no harm. All this is very true. That, however, is not the hinge on which this question turns. It is equally true, that men of ordinary prudence, with a full knowledge that there was but one mode of escape from the mine, hearing a cry of fire, finding the mine filling with smoke, and that from a fire burning in the main shaft, at a point above them and past which they must be carried, if they escape at all, would, ordinarily, be very much alarmed, and, in most cases, lose their ordinary presence of mind. The natural consequence of such a combination of facts would be a rush of the men for the carriage at the main shaft; and, in the smoke and darkness, another very probable consequence would be that some one or more of these men, in this confusion would, by some misstep, or the jostle of a companion, lose his footing and fall down this shaft.

Had there been a second mode of escape, no such cause of alarm would have existed. Men of ordinary prudence would have felt safe, and been left to exercise their caution in avoiding accidents on their way to a sure mode of escape. It has long been settled, that a party having given another reasonable cause for alarm, can not complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility from damages resulting from the alarm.

The jury, under the circumstances, may well have found that the death was the direct result of the alarm; and that the alarm or fright resulted directly from the want of a second mode of escape.

The law of the case seems to have been correctly stated in the instructions.

We find no sufficient ground to disturb the verdict or judgment.

Judgment affirmed.

Statutory regulation of mines; party responsible for accidents: *Sholl v. People*, 93 Ill. 129; *Post* CRIMES.

See cases under ACT OF GOD, MASTER AND SERVANT and NEGLIGENCE.

SAYER V. PIERCE.

(1 Vezey Sr., 232. High Court of Chancery. 1749.)

Plaintiff out of possession. An account of the profits of coal mines can not be decreed in favor of a party out of possession. He must bring his ejectment.

Jurisdiction. Boundaries. The court of chancery may entertain a bill to settle boundaries between coal mines, after a recovery in ejectment, but will not order an account in such case in favor of the party out of possession.

The bill was for an account of coals dug; and to ascertain the boundaries between the plaintiff's and defendant's lease of a colliery.

It stood on two foundations of right; first, a lease by the late Bishop of Durham to the plaintiff's father, but under that no possession was gained by the lessee, who only came upon the place, and forbade the defendant from working therein. Secondly, a lease by the present Bishop on the expiration of the former, which lease still existed, but not even so much was done by the present plaintiff towards gaining possession as by the former lessee.

LORD CHANCELLOR.* Can I decree an account of the profits of a colliery for a person who does not do some act to show possession? Without this, neither an action at law or bill in equity can be maintained for the rents of an estate, whether land or colliery, there not being a title to receive them till possession. The defendant having got possession, the lessee's plain remedy was, as the mines were open, to have brought an ejectment, in which a recovery would have extended to the whole, and no need to bring other ejectments. The only ground for relief is from the confusion of boundaries, to ascertain which still something must be done by the court after the ejectment; and then it will be necessary for the plaintiff to resort back to the court. All I can do is, to retain the bill for a year, with liberty to the plaintiff to bring an ejectment.

For defendant it was insisted that the bill ought to be dismissed entirely, the plaintiff not having a certain right in law.

*Hardwicke.

In Strickland's case a bill was brought against one tenant, for pulling down an inclosure; the court dismissed it with costs, and would not retain it, or try a legal title, which ought to be ascertained at law, although there was a strong reason for it, as the court leans against pulling down inclosures; but if there was no entry, lessee for years (according to Plowden) can no more bring an ejectment, than an action for the mesne profits.

For plaintiff: Where the assistance of this court is necessary to a trial, the plaintiff's proper way is by bill here, and not first to sue at law. So, whenever the party must have relief consequential upon a legal title, as if he wants a perpetual injunction or delivery of title deeds, the legal title must be established under the authority of this court, or all other actions before are nugatory; so in case of a will which is a legal right; and yet any consequential equitable questions are tried under the direction of this court, and no occasion to bring an ejectment first. Where matter of law is joined to equitable relief, this court takes jurisdiction of the whole; as if plaintiff is entitled to a discovery of assets, so that it is necessary to come here, this will not be a handmaid to other courts: it is not proper to come here barely for a satisfaction of waste, as a bill singly for cutting down timber; but otherwise, if also to restrain farther cutting. Actual entry makes no difference, it not being necessary to give all that right which lessee for years could convey. It has been held not necessary unless to avoid a fine; and that confession of lease, entry and ouster, did not confess actual entry where material; but if necessary, that of itself is sufficient ground to come here for relief, as formerly it was for legatee to get consent of an executor; for without leave, entry into the mine can not be; and entry on the land, signifies nothing.

LORD CHANCELLOR. It is very clear, that the utmost I can do is, what was before mentioned; this is not a case in which the plaintiff wants the assistance of this court in order to try a title, there being no deeds or writings in custody of defendant, in which case it would be inconsistent to bring an ejectment first, without the aid of this court. It is difficult to go through with an action at law in case of an account of the profits of coal mines; and therefore this court would go farther than in other cases. But it is the same as a bill for

an account of rents and profits of an estate, which can not be maintained merely on a legal title, unless infancy or something in the way, so that no recovery can be maintained without it. Any difficulty from the mines being unopened is out of the case; the first complaint of the bill being to the contrary. The question is not, whether actual entry is necessary; and I deny, that without that an ejectment can not be brought; for the common rule obliging the defendant to confess lease, etc., is in law sufficient to support that. An ejectment therefore would properly have determined the right; and had it been merely on account of the profits, the bill must be dismissed, but being to ascertain the boundaries, the plaintiff may, if he recovers, want that relief, and then if leave be given to bring an ejectment abstracted from the direction of the court, he must bring a new bill; and should it be dismissed entirely he would be deprived of an injunction if wanted.

ACKERMAN ET AL. V. HARTLEY.

(8 New Jersey, Eq. 476. The Court of Chancery, 1850.)

Account incident to injunction. An account for waste done is incidental to injunction to restrain future waste.

The facts in this case appear sufficiently in the opinion.

THE CHANCELLOR, HALSTED.

On the 26th May, 1835, Abraham Godwin, Jr., leased to Bernard Hartley a lot of ten acres, with the stone quarry thereon, with the privilege of working the said quarry with eight hands, and no more, at any one time; and further, by the lease, agreed that the said Hartley should have the use of all the right of said Godwin in the undivided quarry next adjoining said ten-acre lot; Hartley to pay \$250 rent. During the five years Hartley did no quarrying in the said undivided quarry. After the expiration of this lease no new lease was made, but Hartley continued to work the quarry on Godwin's ten-acre lot, exclusively, until 1845, at a rent of \$200; Godwin having

taken the house on the said ten-acre lot and the use of the land except for quarrying, off his hands. After the lease to Hartley for five years expired, the right to work the adjoining quarry, in which Godwin had an undivided interest, was leased to Van Buskirk and Van Blarcom.

In 1845, Hartley, who, to that time, had continued to quarry exclusively on Godwin's ten-acre lot, worked, in quarrying, beyond the line of that lot, and extended his quarrying to and upon the lot adjoining, in which Godwin had an undivided interest.

On bill filed by the other owners of that lot, an injunction was allowed, restraining Hartley from quarrying further on the last mentioned lot.

The bill also prays, that Hartley may be decreed to account and pay for the stone he had quarried on the last mentioned lot.

Under these circumstances Hartley can not be considered as holding, after the expiration of the lease for five years, any interest in the adjoining quarry, or as standing, in reference thereto, in the place of Godwin, who had an undivided interest therein, as tenant in common with others.

The bill was filed to restrain further waste, and for an account of waste done.

An account for waste done is incidental to relief by injunction against future waste; and is directed on the principle of preventing multiplicity of suits.

An account of the waste done will be directed.

Order accordingly.

RUSSELL v. FORD ET AL.

(2 California, 86. Supreme Court, 1852.)

Account essential, in action between partners. An action by one partner against his co-partners, praying judgment for a specific sum, not asking for an account or a dissolution, but dependent upon an investigation of all the partnership transactions, is a proceeding so irregular that it must be reversed, although no exceptions were taken below.

Appeal from the District Court, Fifth Judicial District, County of Tuolumne.

Russell filed his complaint against the appellants, stating that the parties entered into a mining partnership, in August, 1850, and laid a claim, etc., the gold to be taken from which was to be equally divided between the parties; and that the plaintiff was to be at liberty to go to a certain ranch, and whatever interest he might acquire in it, or whatever compensation he might receive while there, was to be divided between the parties, as an equivalent for the gold taken from the claim; that the defendants took from the claim \$5,000, clear of all expenses, during all the time they were doing which the plaintiff furnished one man to work the claim; that afterward the defendants took two other partners in the claim, with the understanding that the plaintiff was to share one-fifth of the profits, and worked the claim, and divided with the two new partners, giving each of them one-fifth of the profits, amounting to $13\frac{1}{2}$ ounces; that the plaintiff was in partnership with the defendants in other mining transactions, and in driving team, the profits of which were \$600, and were to be equally divided; and that the defendants, though requested, refused to account for or pay the proportions due the plaintiff, to his damage \$3,000, for which he prayed judgment.

The defendants answered, denying the complaint.

The cause was tried by a jury, who found for the plaintiff, for \$1,000; a judgment was rendered accordingly. The defendants appealed. The testimony was annexed to the record, but it does not appear that any exception was taken, nor any motion made for a new trial.

E. W. F. SLOAN and J. K. IRVING, for the appellants.

1. The partnership was still subsisting, and there was no dissolution by the decree, nor any settlement or account. 2. Error in the final decree, apparent on the face of the record, will be noticed in an appellate court.

THOMAS & MORSE, for the respondent.

1. As no motion was made for a new trial, nor any exception

taken, the objections of the appellant go only to the sufficiency of the complaint; and by the Practice Act, Sec. 45, all objections not raised by answer or demurrer, are deemed waived, except objections to the jurisdiction of the court, "and that the complaint does not state facts sufficient to constitute a cause of action." The complaint sets forth a good cause of action. 2. The evidence justifies the verdict, and the judgment was the only one that could have been rendered on it.

Justice HEYDENFELDT delivered the opinion of the court.

This is an action by one partner against his copartners. The complaint is too defective to sustain the judgment. It asks for judgment for a particular sum, forming a part of partnership profits; and does not pray for an account of the partnership concerns, nor for a dissolution of the partnership. It is impossible that a correct decision can be attained as to the right of one partner, unless all the partnership transactions are brought before the court and properly investigated and adjusted.

The judgment must be reversed and the case remanded.

Petition for rehearing overruled.

DEAN V. THWAITE.

(21 Beav., 621. The Rolls Court, 1855.)

Account restricted to period within limitation act—Burden of proof.

When by underground workings the defendant had taken the coal of his neighbor, the court limited the account to six years, but intimated that the amount wrongfully abstracted being proved, the *onus* of proof would lie on the wrong-doer to show that it was not taken within the six years.

Fraudulent concealment of the trespass would alone induce the allowance of an accounting beyond the period of the Statute of Limitations.

The plaintiff's estate adjoined that of the defendant. The defendant's husband prior to his death in 1851, and the defendant subsequently, had, in working their own collieries, passed into and worked the plaintiff's coal; and this, it was

alleged, had been done from 1840. The plaintiff filed the bill against Mrs. Thwaite and the representatives of her husband, for an account of the coal thus improperly taken, and for payment of the value, and for an injunction.

Mr. R. Palmer and Mr. Cairns, for the plaintiff, asked for a general account, contending that the Statute of Limitations did not apply to the case of a concealed fraud, and that time ran only from the discovery of the wrong. They cited *Brooksbank v. Smith*, 2 Y. & C. 58; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Hovenden v. Annesley*, 2 Sch. & Lef. 629; *Booth v. Warrington*, 4 Bro. P. C. (Tom. ed.) 163; *Blair v. Bromley*, 5 Hare, 547.

Mr. Lloyd and Mr. Prendergast, for defendant, contended that in no case had it been decided that the concealment of a trespass was a ground for holding that the Statute of Limitations did not apply. They said that the 26th Sec. of 3 and 4, Will. 4 C. 27, showed the view taken by the legislature on this subject.

THE MASTER OF THE ROLLS.

The question of liability with respect to the working of minerals under ground, which can not be perceived in the same way as operations upon the surface, stands, in my opinion, in a very peculiar light, and it is very important to consider upon whom the burden of proof lies in a case of this description. In my opinion the burden of proof lies upon the wrong-doer, to show that the coal has not been taken from the plaintiff's property within the time during which this court would make him accountable for it. It is impossible for the plaintiff to ascertain that fact; it was solely within the knowledge of the defendants and their workmen.

I think that the plaintiff has made out his right for an account of the coal which has been taken from his ground, subject to the question of the Statute of Limitations, upon which I should wish to hear a reply.

[Mr. R. PALMER was heard in reply as to how far the account ought to be carried back.]

I retain the opinion which I expressed yesterday, that an account ought to be directed, but that it must be confined to the

coal gotten within six years before the filing of the bill. The case of fraud alleged, and the only fraud that I think would justify the court in coming to the conclusion that the coal gotten before that period ought to be accounted for, is, that the defendants had intentionally taken the plaintiff's coal, and had concealed the fact, and during the process had taken steps to prevent the plaintiff discovering it.

Undoubtedly that is alleged, and there is some evidence which leads to that presumption, but it is not conclusive nor is it supported by any documentary evidence; and it is met by counter evidence—at least by positive denial on the part of the defendant herself. In a case of fraud I should require distinct and clear proof against persons liable to be made answerable for the consequences of it.

There are, besides, some indications on the evidence, which weigh with me on this question, that the plaintiff was put upon inquiry, and that various circumstances existed which might have led him to take proceedings at an earlier period than he actually did, for the purpose of ascertaining the state of the works below the surface of the earth, and whether they trenched on his property. I am of opinion, therefore, that in this case, the account must be confined to six years before the filing of the bill. The way I intend to deal with the account is this: I shall see if the parties themselves can agree as to the amount and extent of those workings. If they can not, then I shall probably appoint, under the powers entrusted to me by the act of Parliament (which I think extends to cases of this description), some coal agent, who is perfectly well acquainted with matters of this description, to examine and make a report as to the state of the works, and as to what coal has been taken from under certain plots of land of the plaintiff, which will be specified, and to take all proper measurements for that purpose. Suppose he finds that a certain quantity, say 1,000 tons, has been taken—I shall then call on the defendant to show what portion of that coal has been taken prior to the six years.

I think the burden of proof ought to rest on the defendant, for this reason: I assimilate this to the case, which I have frequently had occasion to refer to, of the chimney-sweep who found the diamond ring: *Armory v. Delamirie*, 1 Strange, 505;

and see 20 Beav. 226; and governed by the principle which I have constantly acted upon, that the case will be taken most strongly against a person who keeps back and destroys evidence, I apply that principle to a person whose duty it was to keep strict evidence of what workings there were in other persons' lands, and shall charge a person working the coal mines on the adjoining land with the full amount raised, unless he prove it was not taken within the time during which the court directs the account. On taking that account, I shall certainly not treat this as a case of fraud, but shall act on any reasonable evidence I can get to ascertain at what time the coal was worked. This is the view I take with respect to the mode of taking the account of the coal worked.

NEALL V. HILL ET AL.

(16 California, 145. Supreme Court, 1860.)

Final Judgment. A judgment, providing, in addition to its other terms, that an account be taken, is nevertheless a final judgment, from which an appeal may be taken.

Motion. A court of equity can not remove the ministerial officers of a corporation.

Trustee holding salaried office. A trustee of a corporation who has performed services and earned a salary as treasurer under contract with the company, can not, in the absence of fraud, be deprived of such salary, on the ground that the by-laws forbid the trustee holding any other office.

No dissolution by decree. A court of equity may compel the officers of a corporation to account, or may restrain the violation of trusts by such officers, but can not dissolve the corporation or make a decree which would indirectly necessitate such a result.

Damages for depreciation of stock can not be charged against the officers of a corporation except in a clear case based on gross neglect or willful misconduct.

Parties to account. Where all the stockholders have not been made parties, but no objection has been interposed on that ground, the point will be considered waived, and an account decreed.

Damages for delay in collecting assessments upon stock belonging to the defendants themselves, officers of a corporation, is an item for reparation upon an accounting.

Appeal from Eleventh District.

Decree in favor of plaintiff, and for an accounting. Receiver appointed.

Plaintiff, a stockholder in the Gold Hill and Bear River Water Company, a corporation under the laws of this State, filed his bill against the corporation and Hill, Smith, Devane, and Lassiter, also stockholders, averring that defendant Hill is president, treasurer and superintendent of the company; that defendant Smith is secretary, and that these four, with another, owned a majority of the stock of the company, and procured themselves to be elected trustees of the corporation; that this was in violation of the by-laws, which prohibited the treasurer and secretary from being trustees; that these defendants, as trustees, have been guilty of fraud, mismanagement, and collusion, with the intent to depreciate the value of the stock, and get it all into their hands. Bill prayed that Hill be removed from office, and for an account, sale of stock, and a winding up of the affairs of the corporation. The answer admits the allegations, excepting the charges of fraud, etc.

On the coming in of the report of the referee, to whom the case was sent to take the account, the court below made a decree removing Hill and Smith from their offices, ordering a sale of the property of the corporation, enjoining it from transacting any business, and appointing a receiver to take entire possession of the property and business. It was further decreed as to Hill, that he pay several thousand dollars to the corporation, for money received over and above that paid out; that his shares of stock be sold for the payment thereof, as also for the payment of \$1,900 to plaintiff for loss sustained by depreciation of his stock from the malfeasance of Hill.

At the conclusion of the decree, the court uses this language: "Now, to the end that this decree may be fully carried out, and that no inconvenience may result from the removal from office of the treasurer, superintendent, and secretary,—is hereby appointed a receiver," to take possession of all the property, real and personal, of the corporation, including books, papers, etc., and keep the same until further order; to sell the shares of stock named in the decree as belonging to

said trustees, and apply the proceeds as therein directed; and generally to collect all money due the corporation, or to become due from rates of water, pay expenses, etc., and bring the remainder into court.

Defendants appeal.

TUTTLE & HILLYER, for appellants.

E. B. CROCKER and HORACE SMITH, for respondent.

COPE, J., delivered the opinion of the court—FIELD, C. J., and BALDWIN, J. concurring.

A motion is made in this case to dismiss the appeal, upon the ground that the judgment appealed from is not final. There is no foundation for this motion. The fact that the judgment provides for the taking of an account, does not destroy its effect as a final adjudication of the rights of the parties. It terminated the entire controversy in the court below upon the merits. Every matter in issue was settled by it, and we are unable to see that anything is wanting to render it a final judgment within the meaning of the statute. Our opinion is, that the appeal is properly taken, and the motion to dismiss is therefore denied.

The action was brought to compel an account and obtain a settlement of the affairs of a corporation. The plaintiff is a stockholder, and the corporation and four of the trustees are made defendants. It is alleged that these trustees are the owners of stock sufficient to enable them to control the business of the company, and various acts of fraud and mismanagement are charged in the complaint. The case was referred to a referee to try the issues and report the facts, and upon the coming in of the report, a judgment was rendered in accordance with the prayer of the complaint. We shall consider such of the specific objections to this judgment as seem to require notice.

That portion of the judgment which undertakes to remove certain officers of the company, and to enjoin them from discharging the duties of their respective offices, can not be maintained. The court had no power to administer relief

of this character, and the attempt to do so was an improper exercise of judicial authority. The officers sought to be removed were the private agents of the company, not essential to its corporate existence, and removable at pleasure. If the courts may direct a corporation in the employment of such agents or remove them when employed, we do not see why they may not exercise the same authority with reference to individuals. The assumption of such authority could be justified by the same reasoning which would justify the action of the court in this case. The power of amotion is incident to every corporation, and the removal of the mere private or ministerial officers of a corporation, is a right which belongs to the corporation alone. The assistance of the courts can only be invoked against such officers as are intrusted by law with the management of the affairs of the corporation, and as against these, the remedy is purely legal. It is well settled that there is no jurisdiction in equity with regard to the removal of corporate officers of any description. This has been expressly decided in several cases.

In the case of the *Attorney-general v. The Earl of Clarendon*, 17 Ves. 491, the principal object of the suit was the removal of the governors of Harrow School; but the court refused to interfere, and Sir William Grant, Master of the Rolls, said: "By the letters patent of Queen Elizabeth, the governors are constituted a body corporate. This court, I apprehend, has no jurisdiction with regard either to the election or the amotion of corporators of any description.

In *Bayless v. Orne*, 1 Freeman Ch. R. 171, the same doctrine was maintained. "It may be contended," said the court, "that the bill in this case does not ask a *removal* of the officers, but we consider that an injunction indefinitely suspending an officer, is in its character so near akin to an absolute removal, as to defy any sound distinction between the two modes of accomplishing the same thing. The right of amoving the officers of a private corporation, belongs exclusively to the corporation itself; this court has no jurisdiction or power for such purpose * * * * If this be true, it would seem to follow that this court can not, by injunction, suspend a corporator or officer from the exercise of his corporate or official

privileges, and thus do indirectly that which may not be done directly."

There are no contravening authorities upon this subject, and in all cases where this power has been exercised by a court of chancery, the jurisdiction has been expressly conferred by statute.

Our opinion is, that an error was also committed in reference to the salary of one of the defendants, as superintendent of the business of the corporation. It was shown that his duties in that capacity had been faithfully performed, and we see no reason for depriving him of the salary to which he is entitled under a contract with the company. It is true this defendant, in addition to his superintendency, was a trustee of the corporation, and held the office of treasurer, in violation, it is said of a positive provision upon the subject in the by-laws of the company. In his connection with these offices, various acts of fraud and mismanagement are charged against him; but many of these charges are entirely unsupported by proof, and there is nothing in the evidence from which we can reasonably infer that any of these acts were induced by fraudulent motives. It was shown that in the management of the business of these offices, no attention had been paid to the by-laws and regulations of the company; but it does not appear that any fraud was either committed or intended; and if any loss was sustained on this account, it would seem that the amount of this loss should constitute the measure of relief.

We are also of opinion that the court erred in the appointment of a receiver, and in decreeing a sale of the property and a settlement of the affairs of the corporation. This decree, if permitted to stand, must necessarily result in the dissolution of the corporation; and in that event the court will have accomplished in an indirect mode that which, in this proceeding, it had no power to do directly. It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations or winding up their concerns. We do not find that any such power has ever been exercised, in the absence of a statute conferring the jurisdiction. There is no doubt that in the present case the court had jurisdiction to compel the officers of the corporation to account for any breach of trust; but the jurisdiction for

that purpose was over the officers personally, and not over the corporation.

"I admit," said Chancellor Kent, in a leading case upon this subject, "that the persons who, from time to time, exercise the corporate powers, may, in their character of trustees, be accountable in this court for a fraudulent breach of trust, and to this plain and ordinary head of equity, the jurisdiction of this court over corporations, ought to be confined:" *Attorney-general v. The Utica Insurance Co.*, 2 Johns. Ch. R. 371.

"It can not be concealed," said the Chancellor, in *Bayless v. Orne*, before referred to, "that to decree the prayer of the complainant's bill, would be to decree a dissolution of the corporation. In this respect, it differs materially from bills which have frequently been entertained by courts of equity, at the instance of stockholders, against the directors of a corporate company, to compel them to account for the improper use of funds, or to restrain them from violating their trust. That a court of equity, as such, has not jurisdiction or power over corporate bodies, for the purpose of restraining their operations or winding up their concerns, is, I think, well settled by various authorities:" See, also, *Verplank v. The Mercantile Insurance Co.*, 1 Edw. Ch. R. 84; *Attorney-general v. The Bank of Niagara*, 1 Hopkins, 354.

It remains to be determined whether, upon the facts of this case, the plaintiff is entitled to any relief whatever. In respect to the diminution in the value of the stock, it does not sufficiently appear that such diminution was caused by any mismanagement of the officers of the corporation. We do not think that under the circumstances, any loss on this account is justly chargeable to these officers. A liability of this character should only be enforced in a very clear case, and where the loss has been occasioned by gross negligence or willful misconduct.

We think, however, that the plaintiff is entitled to an account. His right to maintain an action for that purpose, is too well settled to become a subject of controversy. See Ang. & Ames on Corp., Sec. 312; *Robinson v. Smith*, 3 Paige Ch. R. 222. It is true, all the stockholders are not made parties;

but no objection was interposed on that ground, and it must therefore be regarded as waived. The parties proceeded against have entire control of the corporation, and if the stockholders are not permitted to sue, there is no way of enforcing the accountability of these parties. It appears that the financial affairs of the corporation have been conducted in a loose and unbusiness-like manner, and that these affairs have become so confused and complicated, that it is extremely difficult, if not impossible, to ascertain the condition of the company. It seems that no regular account of receipts and expenditures has ever been kept, and that in this respect, as well as in the entire management of the revenues of the corporation, the by-laws have been systematically disregarded, and their provisions, intended for the safety and security of the stockholders, entirely ignored. It is possible that these facts might, in a proper proceeding, be sufficient to authorize a dissolution of the corporation. But in the present case no such relief can be administered, and the most that can be done is to compel an account, and require the officers of the corporation to make good any loss occasioned by their negligence or improper conduct. It appears that in 1855 an assessment was levied upon the stock of the company for the payment of debts, and that a portion of this assessment was not paid until after the commencement of this suit. Reparation should be made for the delay in the collection of that portion of the assessment. The stock charged with the payment of such portion belonged to certain of the defendants, who were trustees of the company, and had power either to defeat or enforce the collection. The failure to collect was necessarily injurious to the corporation and as no excusing circumstances are shown, we must regard such failure as the result of gross negligence or willful dereliction of duty. It is unnecessary for us to determine whether the court or the referee was correct as to the extent of the injury sustained on account of this failure. We leave that matter for the further consideration of the court.

It is said that the acts and omissions, which are now complained of as breaches of duty on the part of the officers of the corporation, have been acquiesced in by the stockholders, and it is contended that under these circumstances the present action can not be maintained. But so far as the plaintiff is cou-

cerned, no such acquiescence appears, and the acquiescence of the person from whom he purchased, is only material as affecting the extent of the liability of these officers.

From what has been said, it follows that the judgment of the court below must be reversed. Upon the return of the cause, that court will take such further action in the premises, as is consistent with the rights of the parties, and the views expressed in this opinion.

Judgment reversed, and cause remanded for further proceedings.

SMITH V. FAGAN ET AL.

(17 California, 178. Supreme Court, 1860.)

Excluded stockholder against fraudulent associates. A member of a ditch company, whose rights are ignored by the other members, who have also conspired to procure a sale of the property for taxes, is entitled to an account upon such a showing, and to a decree affirming his interest.

Appeal from the Eleventh District.

Complaint avers, that plaintiff and a number of other persons formed a joint stock company, known as the "Miner's Ditch Company," to construct a ditch for water in certain mining localities; that the stock of the company was to be represented by shares valued at one hundred dollars each, of which plaintiff owns seventy, making him the principal stockholder; that the ditch is finished, and has been delivering water to miners for a long time; that defendants, by purchase from some of the original stockholders, are now the owners of twenty-three shares of stock, and refuse to recognize plaintiff as a stockholder in the company, or as in any way interested in the property, or business thereof, or to permit him to exercise any of the rights or privileges of a stockholder. The complaint further avers, that defendants have fraudulently conspired together to injure plaintiff, and deprive him of his rights, by permitting the ditch and property of the com-

pany to be sold for taxes, while said defendants had in hand money and means of the company more than sufficient to pay such taxes; that the ditch, etc., was bought in at the tax sale by defendant Fagan in his own name, but with the company's money; and that he now claims to be sole owner by virtue of the sheriff's deed in pursuance of such sale. There are other averments not material to be stated. Prayer that the sale to Fagan for taxes be set aside, and the deed canceled; that the company be dissolved, an account be taken, property sold, and division made.

A demurrer was filed to the effect, among other things, that the complaint did not state facts sufficient to constitute a cause of action. Overruled. Answer filed denying the allegations of the complaint, but admitting plaintiff to be owner of three and one-half shares of stock, and averring a tender and refusal of those shares.

The case was tried by the court, and judgment rendered that plaintiff was not entitled to the relief demanded; and that "he have nothing save and except the three and one-half shares of stock mentioned and set forth in the answer;" and that defendants have judgment for costs.

Plaintiff, on motion for new trial, filed a statement embracing the testimony and proceedings below, and defendants filed amendments to the statement, but there is nothing in the record showing that the statement was settled, agreed to or signed, either by the parties or the judge.

New trial granted in the following language: "If this be an action at law, the judgment fails to award possession of the three and one-half shares to the plaintiff; and if it be a proceeding in equity, then no account has been taken nor ordered." From the order granting a new trial, defendants appeal.

TUTTLE & HILLYER, for appellants.

I. There is no statement properly certified or agreed to: Pr. Act, Sec., 195; 2 Cal. 306.

II. The bill contains no cause of action. It makes plaintiff and defendants tenants in common, and avers an ouster. Plaintiff's proper remedy is ejectment to settle the title at law: 4 Johns. Ch. R. 590; 3 Edwards Ch. R. 284; Coke on Little-

ton, 199; 5 Bacon, 305; 3 Met. 175; *Waring v. Crow*, 11 Cal. 370.

Even if the original undertakers are to be regarded as partners in the work, defendants come in as purchasers and are tenants in common with plaintiff. *Munford v. McRay*, 8 Wend. 442; 17 Johns. 525; Collyer on Part. 110; *Mitchell v. Vandewater*, 4 Johns. Ch. R. 522; Story on Part. 307, 308; *Putnam v. Wise*, 1 Hill, 234. But the original undertaking constitutes the parties to the work tenants in common: 4 Johns. Ch. R. 590; 3 Edwards' Ch. R. 284.

A bill in equity does not lie for an account between tenants in common, except when each admits the right of the other, and has made the other his bailee or trustee: *Sargent v. Parsons*, 12 Mass. 148, 149; Coke on Littleton, 200, 206; 4 Kent, 365, 370; 1 Johns. Ch. R. 111; 3 Id. 302; 9 Mass. 542, note 6.

A bill for a partition will not lie, except when the title is clear, and admitted by all the parties. If there is a dispute, the title must first be settled at law: *Id.*

The applicant for partition must show seizin and actual possession. A disseizin or an adverse possession bars the suit for partition: *Clapp v. Bromagham*, 9 Cow. 530; Wood's Dig. 202, Sec. 264, *et seq.*

III. If the court should be of opinion that the statement is correct without a settlement or certificate, and that the complaint contains a cause of action, still the testimony sustains the judgment, and shows that the plaintiff is not entitled to any relief.

E. B. CROOKER, for respondent.

1. Appellants object that the statement on motion for new trial was never settled or agreed to. If so, then there is nothing here to show that the court below erred in granting the new trial. The presumption of law is, that the court below decided correctly; and if they contend he erred, it was for them to make out a statement on appeal, properly settled or agreed to, in which the grounds of the alleged error would distinctly appear. Where the evidence is not set out in a statement on appeal, the court will presume that a new trial was properly granted: 9 Cal. 207.

Where a party appears and argues a motion for new trial, he can not object afterward that the statement was not settled or agreed to: *Id.*

2. The complaint is sufficient. Locators and constructors of ditches are partners in the enterprise, and own the property as partnership stock: *Kimball v. Gearhart*, 12 Cal. 27. Equity will treat partnership real estate the same as other partnership stock and property: 3 Kent, 37 and note; Collyer on Part., Sec. 135.

When the defendants are guilty of misconduct or bad faith, or the exclusion of a party from a share in the management of the business, equity will decree a dissolution, and an account and sale: Collyer on Part., Secs. 297, 298, 300.

Joint stock companies are governed by the same rules as other partnerships: Collyer on Part., Secs. 1078, 1081, 1087. And the same rule applies between tenants in common in many cases: *Ruffner v. Lewis*, 7 Leigh, 720; *McClanahan v. Henderson*, 2 A. K. Marsh, 388; *Hannan v. Osborn*, 4 Paige, 336.

The argument and authorities of the appellants on this question are based entirely on common law rules respecting the technical rights of tenants in common, and have no application in a case of this kind.

3. The testimony, if properly before the court, shows that the new trial ought to have been granted.

BALDWIN, J., delivered the opinion of the court, COPE, J., concurring.

The order granting a new trial is affirmed. The bill shows a title to relief upon the ground of the plaintiff's interest, as a stockholder or partner in the joint stock company mentioned therein, entitling him, if the averments were proved, to a decree affirming his interest, and directing an account. The plaintiff was entitled to an account, and we can see no error in the order of the court for a re-trial upon the facts, even if we are to regard the statement as properly before us. If there be no statement, then there is no showing or presumption of error in the action of the court.

Judgment affirmed.

COLLINS ET AL. V. CASE ET AL.

(23 Wisconsin, 230. Supreme Court, 1868.)

Admission not acted on, is no estoppel. In an action to compel defendant to account to plaintiffs for money subscribed and paid by them, and which he as their agent was to invest in oil lands to be owned by the subscribers as a company, the defendant is not estopped to deny that he has received the whole amount of said subscriptions, by the fact that in a report made to the subscribers, he stated that he had received the whole; no one of them having advanced any money, or changed his position in consequence of such statement.

Agent can not make secret profit. In the purchase of the land as such agent, defendant could not lawfully obtain any advantage or make any profit for himself inconsistent with the interests of his principals. And if, by any secret arrangement with the vendors of the land under pretense of commissions or otherwise, he obtained it for a less sum than was expected by the subscribers or represented by himself, he must account for the difference.

Agent must account for his own subscription. Defendant himself being a subscriber, and retaining his interest in the property of the company, as if his subscription were actually paid, he must account for the amount of it, as well as for that of other subscriptions actually paid.

Appeal from the Circuit Court for Racine County.

This action was brought by Henry Collins and thirty others, against Jerome I. Case and sixteen others, to compel an accounting by Case for all moneys received by or for him upon certain subscriptions, made by him and the other defendants and by the plaintiffs, to a fund for the purchase of certain oil lands and leases, said Case having been appointed by the subscribers to said fund their agent and trustee to receive the conveyances of such lands for them; and also to have Case removed from his said office and employment as such agent and trustee, and that a receiver might be appointed of all the lands, property and effects belonging to the plaintiffs and defendants, and "constituting the fund subscribed and contributed by them," and that Case might be adjudged to convey, assign and deliver all the lands and leases so purchased and acquired by him, and all money or property remaining in his hands belonging to the plaintiffs and the other de-

defendants; that the rights and interests of the plaintiffs and said defendants respectively therein might be ascertained and declared by the court, and the receiver directed to make conveyances and payments thereof to said plaintiffs and defendants respectively according to their respective interests therein; and that Case might be temporarily restrained, etc., and for general relief. Case answered, denying that any sum whatever remained due from him as such agent. The specific allegations of the pleadings need not be stated more fully here, as the questions at issue will sufficiently appear from the finding and opinion of the circuit judge. The testimony, which was extremely voluminous, will also be omitted.

The circuit judge found the following facts: 1. On or about the 1st of May, 1865, at the city of Racine, a contract or subscription was entered into by the parties plaintiff and defendant in this action, of the following tenor: We, the undersigned, agree to pay the sums set opposite our respective names, for the purpose of purchasing from Messrs. Goddard, Steers & Co., 2,500 acres of oil lands in fee simple, and 2,500 acres of oil leases, the same to be selected from 20,000 acres of fee and lease interests owned by said Goddard, Steers and others, on the tributaries of the Great Kanawha, in West Virginia. The conditions of the subscriptions are such, that if the land shall prove satisfactory to a committee, to be appointed by the subscribers to examine them, then this subscription to be binding; but otherwise of no effect. The price to be paid for said land is \$20 per acre for both fee and lease interests, or \$100,000 to all. (Subscribed "Case and Knapp, \$20,000," and by the other parties to the action in various sums ranging from \$500 to \$5,000.) 2. Afterward it became apparent that subscriptions to said contract to the amount of \$100,000 could not be obtained, and thereupon, about the 1st of May aforesaid, at said city of Racine, it was agreed by and between said subscribers to close the subscription, and that they should pay into a common fund the sums by them severally subscribed, and that the fund so raised should be invested in the purchase of so much of the lands and leases aforesaid as such fund would pay for at the price before mentioned, one half to be lands purchased in fee, and the other half leasehold interests. 3. On the second of May, 1865, the defendant Case

was appointed by the subscribers to said fund their agent and trustee, to receive from said subscribers the money so subscribed, and pay it over to Messrs. Goddard, Steers & Co., and take the title to the lands so to be purchased, in his own name, but in trust for the use and benefit of said subscribers; and Case accepted the trust, and entered upon the discharge of his duties as such trustee. 4. Prior to this, viz., about March 4, 1865, Case had entered into an agreement with Goddard, Steers & Co., in pursuance of which he afterward entered into their service for the purpose of procuring subscriptions to said fund; and in consideration of such agreement, Goddard, Steers & Co. agreed to pay him for said services, ten per cent. on the amount of the subscriptions to said fund, in case such subscriptions amounted to \$100,000. Said agreement was existing and in full force at the time Case accepted his appointment as trustee of said subscribers, but said subscribers had at that time no knowledge thereof. On his settlement with Goddard, Steers & Co., Case was allowed by them \$3,000 as his commissions, and compensation for his services in procuring subscriptions to said fund, in pursuance of said agreement. 5. Four of the subscribers to said fund, to wit, Wickham, Palmetter, Selden, and the firm of McDougall & Nichols, gave Case, as such agent and trustee, their promissory notes for certain sums in part payment of their subscriptions, the total amount of such notes being \$4,000; and Case was authorized by the subscribers to the fund to take said notes, and, the same are the property of said subscribers. 6. Case was directed by said subscribers to collect said notes, but has never collected any part thereof, except the sum of \$470. 7. Of the subscriptions to said fund, the sum of \$39,170 was actually paid in cash by the subscribers to Case, as trustee, and by him paid to Goddard, Steers & Co.; and the finding specifies the persons by whom such payments were made, with the amounts paid by them severally. 8. The sum of \$25,800 of such subscriptions were never paid to or received by Case (including the sum of \$10,000 subscribed by the defendant Knapp, and various sums subscribed by other defendants, whose names are mentioned in the finding, with the sums by them severally subscribed and not paid to Case.) But said amounts were paid to Goddard, Steers & Co. directly. 9. At a meeting of the

subscribers to said fund, at Racine, July 12, 1865, Case reported to them his acts and doings as their trustee; and he then *reported to them that he had purchased for them of Goddard, Steers & Co., 1,800 acres of land in fee simple, and leases for 1,800 acres of land in West Virginia, for which he had paid to Goddard, Steers & Co. \$72,000; that he had paid defendant Kimbark for the services of an attorney in going to West Virginia and examining the titles to said lands, \$455; that he had charged for his own expenses and time, \$96.50; that he had paid for recording said deeds and leases, \$15.75; that he had paid certain persons for selecting said lands, each \$157.48, making his total expenditures \$72,882.21. He further reported that he had received in cash from the subscribers to said fund \$76,000, leaving a balance in his hands of \$3,117.79. Said report was accepted and adopted by the subscribers to said fund.* 10. Case has actually paid to the said fund, on account of his own subscriptions thereto, \$10,000; he has actually received from the subscribers \$49,170.17, including his own subscription; he has actually paid out on account of said fund, for taxes on the lands purchased by him, \$90; has actually paid out, on account of said fund for various other purposes named in the ninth finding, \$882.21; has actually paid to Goddard, Steers & Co., on account of said fund, \$39,787.96; and has now in his hands, belonging to said fund, and for which he is accountable to said subscribers, \$8,410.

Upon the above facts, the court held, 1. That plaintiffs are entitled to an account, as prayed. 2. That a receiver be appointed, to whom Case shall transfer the titles to all the lands and interests in lands in West Virginia, belonging to the subscribers to said fund; that the same be held in trust for the use and benefit of said subscribers, and be divided among them in the proportion that their several subscriptions bear to the whole amount subscribed; that Case pay to said receiver the above mentioned sum of \$8,410; that said moneys be held by the receiver in trust, and be divided among the subscribers in the proportions above mentioned. 3. That Case is not liable to account to said subscribers, for the unpaid balance of the said notes taken by him from some of the subscribers in part payment of their subscriptions. 4. That Case transfer said last mentioned notes to the receiver, who shall hold them

for the use and benefit of the subscribers, the proceeds to be distributed among them in the proportions above mentioned. 5. That Case is not liable to account to said subscribers for the amount of the subscriptions, which were never paid to him, and which are described in the eighth finding of fact. 6. That Case is liable to account and pay over to said receiver, for the use and benefit of said subscribers, the sum of \$8,410 (mentioned in the tenth finding of fact), with interest thereon from July 12, 1865, to be divided among said subscribers, in the manner above described; and that he pay the costs of this action.

Case excepted to so much of the ninth finding of fact, as is printed above in italics; to the first two and the last two clauses of the tenth finding; and to the first, second, and seventh conclusions of law. The plaintiffs excepted: 1. To so much of the fourth finding of fact, as declares that Case was allowed in his settlement with Goddard, Steers & Co., only \$3,000 as commission, they claiming that the court should have found that he was allowed at least \$20,000. 2. To so much of the fifth finding as declares that Case was authorized by the subscribers to the fund, to take the notes there mentioned, and that the same are their property. 3. To the seventh finding, so far as it declares that Case paid \$39,170.-17 to Goddard, Steers & Co., and that this was all the money paid to him on the subscription. 4. To every part of the sixth and eighth findings, and to all of the tenth finding, except what relates to the two sums of \$90 and \$882.21. 5. To the third, fourth and fifth conclusions of law. 6. To all the first conclusion from and including the words "that the same be held," etc. 7. To all of the sixth conclusion, except what relates to the costs.

The following is the opinion (in an abbreviated form) of the circuit judge, referred to in the opinion of Chief Justice Dixon.

"The complaint avers that all the subscriptions to the fund of the association, have been fully paid. The revised list of subscribers, which appears in the proceedings of the meeting of May 22, 1865, in connection with the appointment of Case as agent or trustee, shows the total amount of the subscriptions to have been \$76,000. Case's answer substantially

admits that all these subscriptions have been paid. The other defendants, by their failure to answer, admit the same fact. It follows that the question of fraud in the inception of this association, and in procuring such subscriptions and the payment thereof (upon which a large amount of testimony has been taken), is entirely out of the case. The plaintiffs claim that this whole amount of \$76,000, was paid to Case; that he purchased the lands for a much less sum than the subscribers had agreed between themselves to pay for them; and that there is a large unexpended balance in his hands, for which he is liable to account to them. He was their trustee to collect the subscriptions and take the title to the lands; and, although he was authorized to pay \$20 per acre for them, if he bought them for a lower price, and retained any of the funds of the association in his hands, it will be conceded that he must account to the association for the funds so retained. On the other hand, he claims that he paid for proper expenses, and for the lands at the stipulated price, all that he received, including his own subscription and more, and that he has no money in his hands in which the subscribers have any interest. And while admitting that the whole \$76,000 was paid, he claims that about one-half of it was paid directly to Goddard, Steers & Co., by the subscribers, and that only the balance was ever received by him."

"The principal questions are: How much of this fund ever came into Case's hands? And what amount of it has he expended?

"As to the notes taken by Case on subscriptions, and remaining unpaid, plaintiffs contend that the taking of them was unauthorized, and that he must account for the amount of them as cash. It appears that a large number of the subscribers gave notes for part of their subscriptions; from which circumstance, I think the authority of Case in the premises may be fairly inferred. Further, I am clearly of the opinion that the action of the subscribers at their meeting in January, 1866, instructing Case to collect these notes, is a ratification of his act in taking them. It is true he has not obeyed those instructions, but it does not appear that the subscribers have suffered any loss by reason of such neglect; and if they have, this action is not brought to recover such loss. I conclude, there-

fore, that Case is not liable to account for the amount of these notes remaining unpaid, as cash in his hands."

"It appears from the pleadings and evidence, that Case received from subscribers on account of subscriptions, \$38,700 (exclusive of his own subscription of \$10,000); and that he received on the note of McDougal & Nichols \$470.17, amounting in all to \$39,170.17. It also appears that certain subscriptions and parts of subscriptions amounting to \$25,800, were not received by Case." (The opinion here recites the list of these subscriptions, being the same mentioned in the eighth finding of fact, *supra*.)

"The plaintiffs contend that he is liable for the whole amount, because, as they allege, at the meeting of July 12, 1865, which was after he had paid Goddard, Steers & Co., and taken conveyances of the lands, he reported to the subscribers that he had received the whole amount of these subscriptions, and receipted therefor, or at least a portion thereof; and they insist that he is therefore estopped from denying that he did in fact receive the whole thereof; and that, not having paid the amount to Goddard, Steers & Co., he must account therefor. I do not understand that the law of estoppel goes to that extent. I think the law is, that if Case made any representations on which the subscribers acted, he can not afterward be permitted to deny the truth of such representations to the injury of those who acted upon them. But no one acted upon the strength of such report and receipts. The subscription was already closed, the money paid and the lands conveyed; and no further action was taken by any of the subscribers. Hence, no one could possibly be injured by allowing the report and receipts to be explained, or even the truth of them to be denied. Case was appointed to collect the subscriptions and pay them over to Goddard, Steers & Co. If subscribers paid their subscriptions directly to that firm, instead of making their payments through Case, and if, by a very common commercial fiction, the firm receipts to him, and he to the subscribers, for the sums thus paid, who is the loser by the transaction? As to one of these subscriptions, however, viz., that of Knapp for \$10,000, there are some circumstances which require special consideration. It is urged by the plaintiff that Case frequently represented to persons who afterward became

subscribers, that he was to furnish, or was furnishing, Knapp with means to pay his subscription; that this representation was one of the inducements which led them to subscribe; that no money was paid Goddard, Steers & Co., on account of that subscription, and, therefore it must be held that Case has the amount in his hands, and must account therefor. The complaint avers, that the subscriptions of Case and Knapp were for \$10,000 each, not jointly for \$20,000, as some of the evidence tends to show it to have been. The parties are bound by that averment; and the liability of Case on account of Knapp's subscription, is precisely the same as it would be on account of any other subscription, concerning which he had made the same representations. What is the extent of that liability? Knapp was under no obligation to get the means from Case to pay his subscription. He may have had the means himself; or he may have been able to procure them elsewhere on more favorable terms. Case could not force him to take the money, nor could he pay his subscription without his consent.

Besides, it was of no importance to the other subscribers whether Case did or did not pay Knapp's subscription, if it was only paid. I think, therefore, that the most that can be claimed against Case by reason of these representations is, that he was bound to see that Knapp's subscription was paid, which in fact was done. I conclude that Case is not chargeable with any portion of this \$25,800. As to his liability upon his own subscription of \$10,000, it is proved that he represented to many who subsequently became subscribers, that his subscription was on the same footing with all others; that he was paying it in cash, dollar for dollar, and other similar statements; and there can be no doubt that numbers subscribed and paid their money on the strength of these representations. The belief that he would pay his own subscription in cash was evidently the principal element that gave vitality to the enterprise. It is evident that he appreciated this fact, from his keeping his arrangement with Steers (Goddard, Steers & Co.) a profound secret. With this knowledge, and without informing the subscribers of his real relations to them, he accepted the appointment as their trustee. Immediately after his appointment a large trust fund was paid into his hands for

the purposes specified in his appointment. His plain duty was to pay into that trust fund the amount of his subscription. The duty was so plain, that a court of equity can not permit him to say that he did not do it. It is no answer to this to say that he made no arrangement with Steers after his appointment as trustee. That arrangement was a continuing one, which culminated, and the profits of which he received after he accepted the appointment as trustee for the subscribers. The two relations were utterly irreconcilable; and when he accepted the trusteeship without disclosing to the subscribers his true relations with Steers, he forfeited the right to assert the existence of those relations, or to reap any benefit therefrom. It follows that he must be held to account for the full amount of his own subscription as cash. It appears from the evidence that he paid a portion of it to Steers in cash and notes. I think the evidence will justify me in finding that the sum so paid was \$1,500. The evidence also shows that on the balance, \$8,500, no money was paid, but that Steers allowed him \$3,000 as commissions for procuring subscribers, and that Case transferred to Steers \$5,500 of his subscription, and in that manner the \$8,500 was adjusted. There is no legal reason why Case should not be allowed to make a sale of his stock in the association to Steers, if such sale was *bona fide*, and not a part of the original secret agreement with Steers. Case being bound to account for the whole amount of his subscription, the burden is upon him to show that the transfer of this stock to Steers was an independent and *bona fide* transaction; and this, I think, he has failed to do. From the testimony, I think either that the \$5,500 constitutes a part of the commission which Case stipulated for in his contract with Steers, or that by threatening to return the money to the subscribers if Steers would not take the \$40,000 cash, more or less, and convey the full complement of the lands, he induced Steers to do so, and the stock was transferred to close up the business. It is immaterial which of these is the correct theory. But if both are erroneous, still, Case having failed to explain the transaction, the transfer of the stock to Steers does not entitle him to a credit for the amount in his account with the subscribers. (The judge then considers the evidence as to the amounts lawfully paid out by Case in the execution of his

trust, and states the account as it is stated in the tenth finding of fact, *supra*.) And inasmuch as Case did not report any balance in his hands when he made his report to the meeting of the stockholders, July 12, 1865, but compelled them to bring this action to demonstrate that there was such a balance, he must be charged with interest on that balance (\$3,410) from that date. And for the same reason he must pay the costs of this action."

Judgment for the plaintiffs, in accordance with the conclusions of law above stated; and both the plaintiffs and defendant case, appealed.

C. W. BENNETT, with H. L. PALMER, of counsel, for the plaintiffs.

JOHN W. and A. L. CARY, for Case.

DIXON, C. J. Cross appeals from the same judgment; which judgment, we think, must be affirmed on both appeals, for the reasons given by the judge of the circuit court in the able opinion filed by him when the cause was there decided. The correctness of the judgment will at once appear when we consider the nature of the action. The complaint charges the defendant Case, in his capacity of agent, with having collected and received from the subscribers, including his own subscription, a large sum of money, only a portion of which was paid out by him in the purchase of the lands and in the necessary incidental expenses, and the residue fraudulently appropriated to his own use. The object of the action, and the sole object, is to compel him to account for and pay over to the parties in interest the money so fraudulently appropriated to his own use. It is an action to compel him to account for the money paid in by the subscribers, assuming their subscriptions to have been fairly and honorably obtained, and is not, therefore, an action charging him with fraud or deceit in procuring the other subscribers, or any of them, to become such, and pay in their money. Such an action, from its nature, would to be an action at law, and not a suit in equity. The fraud here charged was after the subscriptions were made, and consists alone in the secret agreement entered into between the defendant and the owners of the land, by which the defendant was, under

pretense of commissions to be paid by the owners to him, or otherwise, enabled to procure the title at a less price than was supposed by the other subscribers, or than was represented by him to them.

And we furthermore observe that there is nothing in the complaint charging the defendant with fraud or negligence in the collection of the subscriptions, or with fraudulently procuring any other subscriber to be relieved from the payment of his subscription, or to be let in as an apparent subscriber in good faith without such payment. The complaint charges that each subscriber paid over to the defendant the amount of money set opposite his name in the subscription list; and the questions at issue are, whether the subscribers did so, or what sums of money were so paid over to him; and of those sums what amount, if any, has been wrongfully appropriated to his own use by reason of the alleged secret and corrupt agreement between him and the owners of the land.

It is true that the complaint, in addition, charged that the defendant, in his report to the subscribers in July, 1865, represented all or nearly all of the subscriptions as having been paid. But it is obvious, as the circuit judge says, that there was nothing in that transaction to constitute an estoppel. It was at most a mere representation or false statement as to his past dealings with the company. No one has advanced money or changed his position on account of that statement.

Bearing in mind, then, that the issues presented by the pleadings are, as to what sums of money have actually come to the hands of the defendant in the course of his agency, and whether they have all been duly and properly accounted for, it will be seen that the circuit judge was correct when he said that a very large part of the testimony received was totally irrelevant, and could not be considered. The plaintiffs, having therefor, by their pleadings, restricted themselves to a recovery of their share of the money actually paid in to the defendant, and not disbursed by him on account of the company, or for its benefit, the only difficult question arising is, as to whether the defendant's own subscription must be considered as so much money paid in, or held by him for the use of the company. In the purchase of the land, he was acting strictly in the capacity of agent, and as such was bound to a faithful and honest discharge

of his duties. He could obtain no advantage, or make no profit for himself, inconsistent with the interests of his principals. He was made agent on the faith of his being a *bona fide* subscriber, having paid in or holding in his own hands for the use of the company, the money represented by his subscription. He retains his interest in the property of the company, or his shares of the stock, the same as if his subscription had been actually paid in. If he is permitted to do so without the payment of his subscription, then it is manifest that he will have gained, by means of his agency, a very considerable private advantage at the expense of his principals, and quite contrary to their interest, which he is bound to observe. For these reasons we think that he was correctly required to account for his own subscription as so much money paid in, and held by him as agent, and that the judgment of the circuit court should be affirmed.

By the court—Judgment affirmed.

CHAPMAN V. PORTER.

(69 New York, 276. Court of Appeals, 1877.)

Account against mortgagee in possession for dividends on stock. Defendant held salt block No. 140, as collateral security. A company was organized to work the salines, into which the owners could put their respective blocks at a rental in stock, or could take stock and work under the company, or could lease to the company generally. Defendant leased this block (with others of his own) for stock, on which he received dividends. *Held*, that he must account for such dividends as the earnings of the property. 2. That the relation of the parties was sufficient to support a trust, without further consideration.

Charging losses against the mortgagor during a losing year is evidence to establish the investment as made in trust for his benefit.

Corporation books. Entries from the stock ledger and company books *held* competent to show the amount of stock issued; and that it included the stock allotted to this block, and to show the transactions of the company in respect thereto.

Appeal from judgment of the General Term of the Supreme Court, fourth judicial department, affirming a judgment upon verdict in favor of plaintiff.

The action was for an account of profits, and to compel defendant to satisfy a mortgage, and to re-assign to plaintiff a State certificate of lands in Syracuse, which plaintiff claimed he had transferred to defendant as security for indorsements and advances; and to assign to plaintiff a certain lease of a salt block upon the lands described in the State certificate, and to assign to plaintiff certain stock in the Salt Company of Onondaga.

WM. T. TRACY, for appellant. Defendant did not hold the stock as trustee: *Day v. Roth*, 18 N. Y. 448; *Steere v. Steere*, 5 J. Ch. 1; Story's Eq. Jur. § 973; *Rogers v. Murray*, 3 Paige, 390.

DANIEL PRATT, for respondent. Mortgagee in possession must account as trustee: 1 Hil. on Mort. 350, §§ 3—5; Perry on Trusts, § 243; 1 Vt. 270; 6 Mad. 11; 12 Ves. Jr. 493; Trustees can not use the trust property for personal profit: Perry, §§ 427, 431; 3 S. & G. 193; 3 Peere Wms. 251, note *a*; 4 Cow. 417.

CHURCH, CH. J.

The question involved in the appeal to this court is, whether the defendant is bound to account for the profits upon fifty-one shares of stock in the Onondaga Salt Company, for which it is alleged he subscribed, and upon which he received large dividends. It is conceded that the defendant held salt block No. 140, in Syracuse, belonging to plaintiff, as security for existing and future indebtedness. He occupied the relation of mortgagee in possession. A plan for consolidating the manufacture of salt under an organization was devised. The Onondaga Salt Company was incorporated for that purpose. The scheme was for the company to take leases of salt blocks for a term of years, at a rent of twelve and one-half per cent. upon the value of the respective blocks. The stock of the company was to be allotted to the owners of the blocks, and they were allowed the privilege of manufacturing at prices to be fixed by the company. The leasing of the works and subscribing for stock and manufacturing salt were not obligatory, nor was either act dependent upon the others. Persons could

lease their blocks, and not take stock or engage in the manufacture of salt. These several acts were voluntary, but it was expected, and the success of the scheme necessarily depended upon a general compliance on the part of the owners of blocks with the plans adopted.

The question was made on the trial whether the defendant subscribed for the stock allotted to block No. 140. He was the owner of several other blocks, and subscribed for a large amount of the stock, and the evidence was sufficient to justify the finding that he did include in the subscription, fifty-one shares allotted to this block. The presumption from the evidence is, that he subscribed for all the stock to which he was entitled on account of all the property leased by him to the company, and this block was included in the leases made by the defendant. Although not obliged to subscribe for stock, yet having done so, by virtue of the privilege accorded to the owner of the block, which he held as mortgagee for the defendant, there is great force from that relation alone in the position that he is bound to account for the profits derived therefrom. He may be deemed to have elected to treat the property as entitled to the stock, and the profits may justly be regarded as earned by an incidental use, and as arising out of the use of the property. It stands upon a similar footing as the rent—not as directly, but as consequentially. The defendant had the option to take stock by reason of the title of the block being in him. He accepted the option, and within the general principle that a trustee can not use the trust property to his private benefit or advantage, he is bound to account. There is other evidence tending to show that the defendant intended that the plaintiff should have the benefit of the stock subscription, and that he treated it as an incident to the property. This evidence consisted of declarations of the defendant, to the effect that he intended the subscription of stock for the benefit of the plaintiff. There was a conflict of evidence as to these declarations, but the referee found in favor of the trust, and we must assume, in favor of the evidence put in by the plaintiff as to these declarations, and we are concluded by his decision.

It is objected that these declarations are insufficient to impress the stock with a trust character for the want of a sufficient

consideration: 18 N. Y. 448. The answer to this suggestion is that the declarations may be taken as evidence that the subscription was of a trust character, and if intended as such at the time, the relation of the parties to the property is sufficient as a consideration to support the trust.

If the parties regarded the stock as an incident to the use of the property, the subscription was the means of enjoying that use, and the trust relation would impress the profits with a trust character, the same as other avails derived from the use. The circumstance that the defendant charged the plaintiff with the loss in manufacturing salt for one year under the arrangement with the salt company, tends also to show that all that was done in carrying out the general plan before adverted to in using the property, or by reason of it, was done as trustee for the plaintiff. The evidence, taken together, was sufficient to sustain the finding that the defendant subscribed for and held the stock as trustee for the plaintiff. As a question of fact, the finding is conclusive.

The point that the amount of dividends allowed was not justified, can not be considered. The account, which also embraced many other matters, is not given; and I infer that all the evidence is not in the case. The answer admits the receipt of dividends as alleged in the complaint, and the elements for reviewing the amount of such dividends do not appear. The only question presented is whether the dividends are to be accounted for.

The evidence of entries from the stock ledger and books of the company was competent to show the amount of stock issued to the defendant, and was proper upon the questions whether such account included stock allotted to the block in question, and also to show the transactions with the company in respect thereto.

The judgment must be affirmed.

All concur, FOLGER, J., absent, and ANDREWS, J., taking no part.

Judgment affirmed.

1. No cross-bill necessary to perfect accounts between partners: *Atkinson v. Cash*, 79 Ill. 53.
2. Account against agent based on fraud: *Beaumont v. Boulton*, 5 Ves. Jr. 485; *Post* AGENT.
3. Net profits defined: *Binney v. Ince Hall Co.*, 35 L. J. Ch. 363; *Post* PARTNER.
4. Complainant seeking account must show himself in possession: *Bracken v. Preston*, 1 Pinney, 597; *Post* INJUNCTION.
5. Class of cases where equity will decree an accounting: *Id.*
6. Account decreed between stockholders treated as partners: *Butterfield v. Bradsley*, 28 Mich. 412; *Post* PARTNER.
7. Basis or measure of damages on account, between tenants in common of ore banks: *Coleman's App.*, 62 Pa. St. 252; *Post* TENANT IN COMMON.
8. Account sought between organizers and subscribers to Oil Co.: *Densmore Co. v. Densmore*, 64 Pa. St. 43; *Post* CORPORATION.
9. No account between partners without dissolution: *Nisbet v. Nash*, 52 Cal. 540; *Post* PARTNER.
10. Against partner for proceeds of sale: *Rhea v. Vannoy*, 1 Jones' Eq. 282; *Post* PARTNER.
11. Expenditures for repairs and in discharge of liens allowed to accountant in possession of salt works: *Ruffners v. Putney*, 12 Gratt. 541.
12. Expenditures to save from forfeiture allowed: *Dent v. Dent*, 30 Beav. 363.
13. Contribution distinguished from account: *Sedgwick v. Daniell*, 2 H. & N. 319; *Post* PARTNER.
14. Account, in the matter of a colliery, allowed as of the profits of a trade: *Story v. Lord Windsor*, 2 Atk. 630.
15. Basis of accounting with prospector upon a contract set aside for fraud: *Wardell v. Union Pacific R. Co.*, 4 Dill. 330; *Post* FRAUD.
16. Averment of set-off held equivalent to tender of payment in account between vendor and vendee: *Watts v. White*, 13 Cal. 321; *Post* RESCISSION.
17. Account against mortgagee in possession: *Thorneycroft v. Crockett*, 16 Sim. 445; *Post* MORTGAGE.
18. Against tenant in common for conversion. Conversion by co-tenant is not waste, but he must account for the profits: *Smith v. Sharpe*, 1 Busb. Law (N. C.) 91.
19. Account against mortgagor and co-tenants of mortgagor: *Bentley v. Bates*, 4 Y. & C. 182; *Post* MORTGAGE.
20. Account against tenants in common holding and claiming adversely. Rental value adopted as the measure of account: *Allen v. Barkley*, 1 Spear's Eq. 264; *Post* TENANT IN COMMON.
21. Pleadings, parties and measure of damages in account between tenants in common: *Barnum v. Landon*, 20 Conn. 137; *Post* TENANT IN COMMON. *Early v. Friend*, 16 Gratt. 21; *Post* TENANT IN COMMON.

TURNER ET AL. V. THE TUOLUMNE COUNTY WATER
Co.

(25 California, 397. Supreme Court, 1864.)

Quotient verdict. An agreement among jurors to divide by twelve the aggregate of the amounts suggested by each juror on his ballot, and to render a verdict for the quotient without further discussion, results in a vicious verdict, voidable under the Practice Act; but if they ballot in that manner without agreeing to be bound by the result, the verdict so found is good.

Affidavits of jurors. Such a verdict, not being a *chance* verdict, can not be impeached by the affidavits of jurors under the statute.

Extraordinary storms are the act of God, but a defendant is liable, where without his agency, such storms would have worked no harm to the plaintiff.

Self-preservation. The law of self-preservation as applied to cases of life and death does not apply to the case of property. A. may not destroy the property of B to save his own property.

Tapping swollen ditch. Where a swollen ditch crosses natural ravines into which the owner might have harmlessly turned off the excess of the flood, but instead, he taps his ditch so as to flood a farm—these facts will justify a verdict imputing negligence.

Exceptions to evidence. *An objection to evidence not followed by an exception amounts to acquiescence in the ruling.

Appeal from District Court, Fifth Judicial District, Tuolumne County.

The opinion states the facts.

H. P. BARBER, for appellant.

H. H. HARTLEY, for respondents.

By the Court, SANDERSON, C. J.

This action was brought to recover damages from the defendant, a ditch corporation, for the negligent, careless and wanton discharge of the waters accumulated in defendant's ditch in and upon the lands of the plaintiffs, whereby the same

*Approved *Keeran v. Griffith*, 34 Cal. 536.

were injured to the amount of ten thousand dollars, as alleged in the complaint. The jury rendered a verdict in favor of the plaintiffs for the sum of six thousand one hundred and thirty-seven dollars and fifty cents. Thereupon, the defendant moved for a new trial, upon the following grounds:

First—Misconduct and irregularity in the proceedings of the jury in determining their verdict by chance.

Second—Insufficiency of the evidence to justify the verdict, and that it is against law.

Third—Error in law occurring at the trial, and excepted to by defendant.

The motion for a new trial was denied, and the defendant appeals.

1. As to the first ground, both parties rely solely upon the affidavits made by most, if not all, of the jurors by whom the verdict was rendered, no other evidence being offered by either. As to the facts established by these affidavits, the parties disagree. Under the view which we have taken of the question presented, it becomes unnecessary for us to determine this dispute, and we shall assume that the facts presented by the affidavits are as claimed by the appellant. For the purposes of our decision, we therefore assume that the verdict, so far as the amount of the damages was concerned, was rendered in pursuance of an agreement between the jurors to the effect that each should put down upon a separate piece of paper the amount which he thought the plaintiffs were justly entitled to recover; that the several sums thus marked should be added together and the total amount divided by twelve, and that the quotient, whatever it might be, should be their verdict, without further consultation or discussion.

Where damages are to be assessed by a jury, it not unfrequently, if not always, happens that there is a great diversity of opinion as to the amount which ought to be given. Where such is the case, the verdict must necessarily be the result of mutual concession, and the jury are bound to seek for a medium sum upon which their conflicting views may harmonize. It will frequently happen that this medium sum will be the average, or approximately so, of the different sums advocated by each. To ascertain this average, the jury may properly adopt the method which was used in the present case,

but they ought not to agree to be bound by the result, whatever it may be. If they do so agree, and such result is made the verdict without further consultation or assent, such verdict is vicious and irregular, and must be set aside whenever the fact is made to appear by proper and competent evidence. If, on the contrary, they do not agree to be bound by the result, but reserve to themselves the right to dissent, such a proceeding is not irregular; and if afterward, upon consultation and discussion, they finally agree to adopt such result as their verdict, the verdict so found is good: *Dana v. Tucker*, 4 Johns. 487; *Harvey v. Rickett*, 15 Johns. 87; *Smith v. Cheet-ham*, 3 Caines, 57; *Grinnell v. Phillips*, 1 Mass. 541; *Warner v. Robinson*, 1 Root, 194; *Wilson v. Berryman*, 5 Cal. 44 *Roberts v. Failis*, 1 Cow. 238.

Under the facts of this case, as we have assumed them to be, the verdict is undoubtedly vicious, and ought to be set aside. The only question for us to determine is whether the affidavits of the jurors can be received for the purpose of establishing those facts. Although there is some conflict of authority upon this question, the better opinion seems to be, that by the common law, the affidavits of jurors can not be received for the purpose of impeaching their verdict, but may be admitted in support thereof: *Vaise v. Delaval*, 1 Term Rep. 11; *Dana v. Tucker*, 4 Johns. 487; *Sargent v. Deniston*, 5 Cow. 106; *Ex parte Caykendoll*, 6 Cow. 53; *The People v. Columbia Com. Pleas*, 1 Wend. 297. But this rule of the common law has been changed in this State, to a certain extent, by statute. The second subdivision of the one hundred and ninety-third section of the Practice Act provides that the misconduct of the jury shall be cause for new trial, "and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding on any question or questions submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavits of any one or more of the jurors." Being in derogation of the common law, this statute must be strictly construed, and can not be held to include such kinds of misconduct as do not come clearly within the descriptive terms of the act. Why the legislature should sanction different modes of proving different kinds of misconduct is not readily perceived. If the

affidavits of the jurors are to be received for the purpose of establishing certain kinds of misconduct, there seems to be no good reason why they should not be received as to all kinds without distinction. But that the legislature has made such a distinction is manifest, and we are bound to take the law as we find it, regardless of its incongruities. As the law now stands, there are certain irregularities fatal to a verdict which may be proved by the affidavits of the jurors, and certain other irregularities equally fatal, which can only be proved in the manner authorized by the rules of the common law; and it only remains to determine whether that which is alleged in the present case belongs to the former or latter class. If the method adopted by the jury for the purpose of arriving at a verdict may be properly characterized as "a resort to the determination of chance," the affidavits in question are admissible; otherwise, not.

We have not been able to find a case in which such a verdict has been held to be a chance verdict, but we have found several where the contrary has been maintained. In *Cowperthwaite v. Jones*, 2 Dall. 55, the jury adopted the same method of ascertaining the amount of damages which was resorted to in this case, and the court said: "The first objection as to the manner of the jury collecting the sense of its members, with regard to the *quantum* of damages, does not appear to us to be well founded or at all similar to the case of casting lots for their verdict." This case was afterward affirmed in the Supreme Court of Pennsylvania.* In *Thompson v. Commonwealth*, 8 Grat. 637, the Supreme Court of Virginia, in commenting upon this method of ascertaining the amount of damages to be inserted in a verdict, said: "What more, we would ask, have the jury done in this case than what we know is of every-day occurrence in trials of courts of equity, where, when a question of damage, or value, or compensation arises before the master, and when witnesses of equal credibility or integrity and intelligence differ in their estimates, the master adopts as his assessment an average of the estimates of such witnesses; and this practice is sanctioned by a court of equity, which is a court of conscience as it is of law and justice. In-

*We can not find it: the judge was misled by a foot note which refers to the preceding case: 1 Dall. 55.

deed, in some cases, it may be considered a rule of necessity as well as conscience." In *Smith v. Cheetham*, 3 Caines, 61, Mr. Chief Justice Kent said: "If the jury cast lots for whom they shall find, it would, no doubt, vitiate the verdict. * * The charge here is not that the jury cast lots whether they should find for the plaintiff or defendant, but only that in ascertaining the amount of the damages, they took the average sum deduced from the different opinions of each other. This has no analogy to the case of casting lots, or determining by chance for whom they shall find." In *Wilson v. Berryman*, 5 Cal. 46, Mr. Chief Justice Murray said: "Such verdicts are regarded in the same light by the courts as gambling verdicts, and will be invariably set aside, just as if the jury had thrown dice or resorted to any species of gambling to determine the amount." Thus he admits that such a verdict is not a chance verdict, while he holds it to be equally vicious.

But independent of authority, it is manifest that there is no element of chance in such a verdict. Each juror marks a sum which, in his judgment, represents the true amount of damages. Neither of these sums is the result of chance; on the contrary, each is the result of the judgment or will of the juror by whom it was marked. Neither is the aggregate of these sums, nor the quotient resulting from a division of the aggregate by twelve, the result of chance, but, on the contrary, the result of the most accurate of the sciences. Thus, from the commencement to the end of the process, no quantity which enters into the final result is determined by a resort to chance.

We are therefore of the opinion that the verdict in this case is not a chance verdict, within the meaning of the second subdivision of the one hundred and ninety-third section of the Practice Act, and that for that reason the affidavits of the jurors by whom it was rendered can not be admitted to impeach it. There being no other evidence, it follows that the verdict, so far as the point under consideration is concerned, must be allowed to stand.

2. It is next claimed by appellant that the verdict is contrary to the evidence, and ought to be set aside upon that ground.

The cause of action specified in the complaint is the negli-

gent, careless, and wanton discharge of the waters of defendant's ditch upon the lands of the plaintiffs by the act of the defendant. This was done during the great flood of eighteen hundred and sixty-two, and it is claimed by the appellant that the damages sustained by the plaintiffs were occasioned by the act of God. The extraordinary storms of that year, it is true, were the acts of God; but the evidence shows that those storms would not have caused the damage in question but for the agency of the defendant. But for defendant's ditch and their management of it, the plaintiffs' farm would have remained uninjured. As appears from the evidence, the storm was not sudden, but gradual, affording the agents of the defendant ample time to take such steps for the protection of the ditch against its effects as their judgment dictated. To that end they adopted such measures as they saw proper, and it is of those measures that the negligence, carelessness, and wantonness which are the foundation of the action are predicated. The evidence shows that had other measures been taken, the defendant's ditch would have been equally protected and no damage would have been done to the plaintiffs' farm. While the defendant had an undoubted right to ward off from its own property the damaging effects of the storm, yet in exercising that right it was bound to take care not to injure that of the plaintiffs. The defendant had no right to adopt measures for the protection of its own property which would lead to the destruction of the plaintiffs'. A, for the purpose of saving his own life, may, if it be necessary, take the life of B. Thus, if A and B are wrecked at sea and both cling to the same spar, as the only means of saving life, and the spar is insufficient to sustain both, A may wrest the spar from the grasp of B, although the death of B may be the immediate consequence. This is allowed by the law of self-preservation. But this rule does not extend to property, and A may not, in order to save his own property, destroy the property of B, however urgent the necessity. The evidence shows that the defendant's ditch passed along the side hill, crossing and damming up ravines and gulches, which in times of freshet constituted natural watercourses, into which defendant could have turned the water without any injurious result to the plaintiffs' farm; yet this was not done, but on the contrary the

water which was so destructive to the plaintiffs' farm, was turned out of the ditch at a point where there was no ravine or gulch. The agents of the defendant seem to have acted solely for the safety of the ditch, regardless of consequences, so far as the property of others was concerned. Whether in so doing they were guilty of negligence was a question for the jury to determine from the evidence under the instructions of the court. That the evidence tends to prove negligence can not be denied, and that the jury was correctly instructed by the court as to the law of the case, we are bound to presume, for the record does not contain the instructions. It results that, in our judgment, the evidence sustains the verdict.

3. The only error of law assigned which we have not already considered, is as to the admission of certain evidence as to the construction of the ditch. This evidence was objected to by counsel for the appellant, and the objection was overruled by the court, but it nowhere appears in the record that counsel took an exception to the ruling of the court. Such being the case, he is presumed to have acquiesced therein.

Judgment affirmed.

Tools sticking in oil well, not an act of God: *Janes v. Scott*, 59 Pa. St. 178; *Post* GUARANTY.

A heavy flood, preventing navigation, *held an act of God*, in a case of contract for the delivery of coal: *Lovering v. Buck Mountain Co.*, 54 Pa. St. 291. *Post* RAILROAD.

THE 420 MINING COMPANY v. THE BULLION MINING
COMPANY.

See 3 Saw, 634, same plaintiff, same defendant, holding this decision to be a final adjudication of title. *Post* PATENT.

(9 Nevada, 240. Supreme Court, 1874.)

Jurisdiction of state courts. The acts of Congress passed July 26, 1866, July 9, 1870, and May 10, 1872, did not confer any additional jurisdiction upon the State courts. The object of the law was to require parties protesting against the issuance of a patent to go into the State courts of competent jurisdiction and institute such proceedings as they might under the different forms of action, therein allowed, elect; and there try "the right of possession" to such claim and have the question determined; and such action must be tried by the same rules, principles and statutes which apply in the State courts, irrespective of the acts of Congress.

Estoppel--Statute of limitations. F commenced suit in support of an adverse claim under the mining act of Congress of 1872 (R. S. § 2326). *Held*, that the pendency of a former suit to recover possession of the mining claim in which F was defendant, would not estop B, the former plaintiff and present defendant, from claiming the benefit of the statute of limitations, although B had averred in his complaint that F was in possession.

Appeal from the District Court of Storey County, First Judicial District.

The property in controversy in this case consisted of four hundred and twenty feet of mining ground on the Coinstock Ledge, next south of the Chollar claim, in Storey county. The facts are fully stated in the opinion. There was a judgment for defendant. Plaintiff moved for a new trial, which was refused, and it then appealed from the judgment and order.

LEWIS & DEAL, L. ALDRICH and C. E. DELONG, for appellant.

D. BIXLER, for respondent.

By the Court, HAWLEY, J.

This action was commenced on the 29th day of November, 1872. It is alleged in the complaint that plaintiff is now,

and it and its grantors have been since 1859, the owners of, in the possession of, and entitled to the possession of certain mining ground, consisting of four hundred and twenty feet (described by metes and bounds); that the defendant claims an estate or interest therein, adverse to plaintiff, and that said claim is without any right; that on the 16th day of November, 1865, the Bullion Mining Company, defendant herein, commenced an action in the district court of Storey county against the plaintiff to recover possession of said mining ground, "which said action was entitled '*Bullion Mining Co.*, plaintiff, v. *Four Twenty Mining Co.*, defendant;'" "that on the 27th day of November, 1865, this plaintiff, then defendant, duly filed and served its answer to the complaint in said action, specifically denying every material allegation in said complaint; that thereafter and before the dismissal of said action as hereinafter set forth, said Bullion Mining Company filed its application with the register of the land office at the city of Carson, State of Nevada, for a patent from the government of the United States to certain mining ground, and included in said application the four hundred and twenty feet of mining ground hereinbefore described; that the Four Twenty Mining Company in due time filed its protest to said application for patent, setting up its adverse claim to the northern part or portion to the extent of four hundred and twenty feet of the mining ground embraced in said application, and, among other matters, set forth the pendency of said action, and thereupon all proceedings in said application for patent were stayed; that thereafter and on, to wit, the 5th day of October, A. D. 1868, the said action was stricken from the calendar of said court and the papers therein sent to the clerk's office, subject to reinstatement, and that on, to wit: the 3d day of June, A. D. 1872, on motion of counsel for plaintiff, said Bullion Mining Company, said action was placed on the calendar, and on motion of same counsel was dismissed, in the absence of, without the knowledge of, and without notice to the defendant, the Four Twenty Mining Company, or its counsel, of either or any of said motions; and that the said Four Twenty Mining Company or its counsel had no knowledge of the action of said plaintiff until after

the filing of a certificate of dismissal of said action with the register of the land office aforesaid."

It is further alleged: "that the rights of the respective parties to the possession of the said mining ground and premises have never been judicially determined, or settled, or in any manner adjusted." The prayer is that the defendant may be required to set forth the nature of its claim; that it be decreed and adjudged "that the defendant has no estate or interest whatever in or to said mining ground, and that the title of plaintiff is good and valid; that the defendant be forever barred from asserting any claim whatever to said mining ground," etc.

The defendant, in its answer, denies the ownership and possession of plaintiff, and avers "that at the commencement of this action, and for a long time prior thereto, it was, and still is, the owner of and in the possession of and entitled to the possession of said mining ground * * and every part thereof." And for further answer, pleads the statute of limitations.

The cause was tried before the court without a jury. From the findings of the court it appears "that some time in the fall of 1859, a shaft was commenced on the northern end of the ground in dispute in this action, by some persons claiming to represent a company called the 420 Company, and thereafter down to the early part of the year 1863, work was done in three different shafts on the ground in dispute, by persons claiming to work for a company called the 420 Company; that no further work for any company of that name is shown to have been done until some time in the year 1865, when some persons commenced work in a shaft on said ground, claiming to work for the 420 Company, and continued there for a short time until ejected by the employes of defendant, as hereinafter stated." (Finding 3.) "That the agents of defendant, in the year 1865, forcibly ejected from the mining ground in dispute in this action, the persons mentioned in finding 3 as working thereon for the 420 Company, and from that time until the commencement of this action and until this trial, the defendant has been in the actual, exclusive and uninterrupted occupation and possession of all of the mining ground in dispute in this action, * *

claiming title thereto, and claiming the same adversely to this plaintiff." (Finding 9.) These findings are fully supported by the evidence. The commencement, pendency and dismissal of the suit entitled "*Bullion Mining Co. v. Four Twenty Mining Co.*," is set forth in the findings substantially as alleged in plaintiff's complaint. The complaint in that action was verified by George W. Hopkins, secretary of said Bullion Mining Company. It was alleged in said complaint that the Bullion Mining Company was the owner of, and entitled to the possession of, the mining ground in dispute in this action; that the Four Twenty Mining Company had wrongfully and unlawfully entered upon, taken possession of, and ousted the plaintiff from said mining ground, and was still in possession thereof, claiming adversely to the Bullion Mining Company, and refuses to permit the Bullion Mining Company to possess, use or occupy said mining ground, or any part thereof, "in common with the defendant or otherwise."

1. To avoid the statute of limitations, it is claimed by appellant that this action is brought under an act of Congress; and hence, that the limitations provided for by the statute of this State, do not apply. The act of Congress provides that where an adverse claim is filed within the time and in the manner specified in said act, certain proceedings "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment, and a failure to do so shall be a waiver of his adverse claim." The act further provides that "after such judgment shall have been rendered, the party entitled to the possession of the claim * * may * * * file a certified copy of the judgment-roll with the register of the land office," and upon compliance with this and other provisions in said act, "a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess:" U. S. Stats. 1872, 91, Sec. 7. (R. S. § 2326.)

Congress did not by the passage of this act, or by the acts passed July 26, 1866, and July 9, 1870, confer any additional jurisdiction upon the State courts. The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the State courts of competent jurisdiction and institute such proceedings as they might under the different forms of action, therein allowed, elect; and there try "the rights of possession" to such claim and have the question determined. The acts of Congress do not attempt to confer any jurisdiction, not already possessed by the State courts; nor to prescribe a different form of action. If the parties protesting are in possession of the ground in dispute, they can bring their action under Sec. 256 of the Civil Practice Act (Stats. 1869, 239), or, if they have been ousted from the possession, they could bring their action of ejectment; and in either action "the rights of possession" to such claim could be finally settled and determined. We are of opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes that apply to such actions in our State courts, irrespective of the acts of Congress. The fact, as found by the court, that the defendant had been in the actual, exclusive and uninterrupted occupation and possession of all the mining ground in dispute, claiming title thereto adversely to plaintiff for more than seven years prior to the commencement of this suit constitutes a complete bar to this action: 1 Comp. Laws, 243, 244, Secs. 4, 5.

To have maintained any action in our State courts "to try the rights of possession" to a mining claim, the plaintiff must have shown that it, or those through or from whom it claims "were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action:" 1 Comp. L. 1019, Sec. 4.

2. But it is argued by appellant's counsel that owing to the pendency of the suit of the "*Bullion Mining Co. v. Four Twenty Mining Co.*," until June, 1872, the defendant in this suit is concluded from asserting any rights or privileges under the statute of limitations. This position is sought to be

maintained, upon the theory that the defendant, by allowing that suit to remain is estopped from proving, in this action, that the Four Twenty Mining Company was not in possession at the time of the dismissal of said suit, counsel claiming that as long as said suit remained pending in said court it amounted to a continuous allegation, from day to day; that the Four Twenty Mining Company was in possession; and that said suit not having been dismissed until the 3d day of June, 1872, the statute did not begin to run until that time.

We consider this position wholly unsupported by reason or authority. The general doctrine announced in the authorities cited by appellant to the effect that no man can take advantage of his own wrong and thereby sustain a defense of which in conscience he ought not to be permitted to avail himself, has no application to this case. The averment in the complaint that on a certain day the Four Twenty Mining Company was in possession of certain mining ground was a mere statement or declaration, subject to amendment and susceptible of proof. But if treated as a *solemn admission*, it would only amount to a continuous allegation that on the 16th day of November, 1865, the Four Twenty Mining Company was in possession of said ground—a fact which defendant in this suit does not attempt to deny. The fact then of the pendency of such a suit in no wise estops the plaintiff from pleading the statute of limitations. If the agents, servants and employes of plaintiff were forcibly ejected from the ground in dispute in 1865, it must have known the time when it occurred. It must also have known that defendant was in possession claiming the ground adversely to it, and it was not, by any act of this defendant, prevented from commencing an action to preserve its rights to said ground before the period prescribed by the statute of limitation had expired. It can not plead ignorance of the law or the laches of defendant in not bringing the former case to trial or having it dismissed, as an excuse for not asserting its rights until the same were barred by the statute.

3. The findings of the court are sufficient to show that the possession of defendant was "open and notorious." The objections urged by appellant upon this point are clearly untenable.

4. Appellant contends that the entry of defendant in 1865 should be construed simply as an assertion of the rights it claimed in the action of ejectment. The averments of the complaint in said action, although subject to criticism, will hardly justify the position upon which said claim is founded, to wit, that the defendant claimed merely a right of tenancy in common with the plaintiff. When the plaintiff was forcibly ousted the defendant claimed the whole of the ground in dispute, and has ever since had the actual and exclusive possession thereof, claiming the same adversely to the plaintiff. This fact entirely destroys the conclusion sought to be maintained by appellant.

The judgment of the district court is affirmed.

GOLDEN FLEECE G. & S. M. Co. v. THE CABLE CONSOLIDATED G. & S. M. Co.

(12 Nevada, 312. Supreme Court, 1877.)

Better title must prevail—Possession. In a suit supporting an adverse claim the better title must prevail. Actual possession makes a *prima facie* case and shifts the burden; but actual possession is not essential if the right of possession be proved.

Facts amounting to possession. Proof of a surface claim marked by a U. S. surveyor, including a lode running with the claim, worked within the surface lines, is a sufficient showing of possession on the part of plaintiff to put the defendant on proof of his right.

Aliens can not locate. An alien who has never declared his intention to become a citizen of the United States, can not locate a mining claim, nor can he hold by actual possession against one who connects himself with the government by compliance with the mining law.

District organization not essential. District rules not in conflict with State or Federal legislation are recognized, but the existence of a mining district or of district rules is not essential to validate a location.

Relocation. When the first locator is an alien, or if a location be left incomplete, or abandoned, the ground becomes open to relocation "as completely as if no stake had ever been planted upon it."

Staking. Staking boundaries does not of itself amount to a location.

Record of location—Description. A record is not required by the U. S. Mining Acts, but may be by local law. And if required by local law, it must contain an accurate description, and fix the *locus* of the claim by reference to natural objects or permanent monuments.

Admissions of grantor do not bind grantee. One who has conveyed his interest can not make admissions binding upon his grantees, as to the invalidity of his location. The admissions of such a party that he was an alien would not be evidence; and his testimony when examined as a witness is not conclusive, so as to justify the court in acting upon his alienage as a fact, before the jury have passed on the issue.

Alien and citizen, joint location. The fact of one of several locators being an alien does not invalidate the location as to his co-locators.

Admission of title-papers when location disputed. The court can not exclude conveyances offered in evidence, upon the grounds of invalidity in the location upon which they are based, when the validity of such location is at issue before the jury, depending upon a question of fact, which it is for the jury to decide.

Boundaries must be marked and can not be changed. Before the passage of the U. S. acts now in force, the staking of the boundaries of lode claims was not customary, but under those acts it is essential; and when the boundaries are so defined, they can not be changed to the injury of any intervening locator, but (suggested) that a district rule allowing a reasonable time to ascertain the course of the vein before fixing boundaries, would not be invalid.

Side lines. A vein can not be followed beyond the adopted side lines.

DELONG & BELKNAP, for appellant, who was defendant below.

R. S. & W. S. MESICK, for respondent, plaintiff below.

Appeal from Second Judicial District, Washoe county.

Plaintiff claimed the Golden Fleece lode; defendant claimed the Leonard lode, and applied for patent. The adverse claim was filed, and suit instituted on behalf of the Golden Fleece claim.

The Golden Fleece was the older location, but after the Leonard location had been made or attempted, it had been re-located across the ground meanwhile taken up by the Leonard lode.

Brief of Appellant:

I. The motion for a nonsuit should have been granted: 38 Wis. 320. Mining claims on the public lands must be held and worked in accordance with the local mining laws in force in the mining district where the same are located: *Strang v. Ryan*, 46 Cal. 34; Revised Laws of U. S., Sec. 2324. There

was no sufficient proof of the mining record being made by a proper officer or by any authority; or that the record was made, or the claim located, in accordance with any mining rules or regulations whatever. The mining laws of the locality govern the location and manner of developing the mines; and where they directly point out how such mining claims must be located, and how the possession, once acquired, is to be maintained, that course must be strictly pursued: *Mullett v. Uncle Sam*, 1 Nev. 188; *Overman S. M. Co. v. Amer. M. Co.*, 7 Nev. 318. Mining regulations and instructions issued by the general land-office: Skidmore, 37, Sec. 12. Plaintiff must recover on proof of his own title, and not on the weakness of his adversaries: *Mullett v. Uncle Sam*, 1 Nev. 188.

. II. The court erroneously refused defendant the privilege of having a special verdict, as required by law: Nev. Stat., Sec. 1238.

III. The court erred in refusing the instructions asked for by defendant: U. S. Rev. Laws, Sec. 2324; *Overman S. Mining Co. v. Amer. S. Mining Co.*, 7 Nev. 318; Broom's Legal Maxims, Sec. 353; *English v. Johnson*, 17 Cal. 107; *Attwood v. Fricot*, 17 Id. 37; *Rogers v. Cooney*, 7 Nev. 219; *Hess v. Winder*, 30 Cal. 349; *Morton v. Solambo C. M. Co.*, 26 Id. 527; *Ayres v. Bensley*, 32 Id. 620; *Potter v. Knowles*, 5 Id. 87; Skidmore, 37, Secs. 13 and 14; Copp's Decisions, 59; U. S. Rev. Stats., Sec. 2320.

IV. The court erred in refusing to allow defendant to prove a delivery of possession by the original locators to Bennett and Free under the contract, and from Bennett and Free to the defendant. This proof was necessary, not only to disprove the possession plaintiff claimed, and which it was necessary for it to have to maintain this action; but such possession being prior, continuous and actual, would render their location void as not being of unoccupied unclaimed land: *Table M. Co. v. Stranahan*, 20 Cal. 198; *Jackson v. Feather River W. Co.*, 14 Id. 22.

V. Under a proceeding of this nature the only question referred to the State court to try is the right of possession: U. S. Rev. Stats., Sec. 2326; 1 Nev. Comp. Laws, Sec. 1674.

VI. The State constitution gives aliens who are *bona fide*

residents of the State the same right to possess real estate as other persons enjoy: Art. 1, Sec. 16. Plaintiff had no right to cross-examine Leonard as to his citizenship; he could only be examined as to facts and circumstances connected with the matters stated in his direct examination: *Landsberger v. Gorham*, 5 Cal. 450; *Jackson v. Feather River Water Co.*, 14 Id. 19; *Thornburgh v. Hand*, 7 Id. 561; *Aitken v. Mendenhall*, 25 Id. 212. The title of an alien is good as against the whole world, except the government, and can only be divested by the government by the exercise of its prerogative: *Craig v. Leslie*, 3 Wheat. 590; *Fairfax v. Hunter*, 7 Cranch. 620; *Gouverneur's Heirs v. Robertson*, 11 Wheat. 356; *Jones v. McMasters*, 20 How. 8; *Jenkins v. Noel*, 3 Stew., Ala. 60; *People v. Folsom*, 5 Cal. 373; *Dudley v. Grayson*, 6 Mon., Ky. 260; *Buchanan v. Deshon*, 1 H. & G., Md. 280; *Sheaffe v. O'Neil*, 1 Mass. 256; *Jackson v. Smith*, 7 Wend. 368; *Munro v. Merchant*, 28 N. Y. 9; *Marshall v. Loveless*, Cam. & N. (N. C.) 217; *Doe v. Horniblea*, 2 Hayw. (N. C.) 37; *University v. Miller*, 3 Dev. (N. C.) L. 191; *Groves v. Gordon*, Mill, (S. C.) Ct. 111; *Marshall v. Conrad*, 5 Call., Va. 364; *Osterman v. Baldwin*, 6 Wallace, 121; *Cross v. DeValle*, 1 Id. 8; *Bradstreet v. Supervisors of Oneida Co.*, 13 Wend. 546; *Ford v. Harrington*, 16 N. Y. 285; *Overing v. Russell*, 32 Barb. 263-5; *Ramires v. Kent*, 2 Cal. 558; *California v. Rogers*, 13 Cal. 160.

Naturalization is held to have a retroactive effect, and is deemed a waiver of all liability to forfeiture and a confirmation of the alien's former title: 2 Blackstone, 249; 1 Johns. Cases, 401; *Briest v. Cummings*, 20 Wend. 353-4; Skidmore's Law Decisions, 66, Sec. 3; therefore any defect in Leonard's title by reason of his not having declared his intention to become a citizen at the time he located this mine, was cured by his act of declaring his intention to become a citizen before he deeded to the corporation. This was done before his alienage was determined or his incapacity to hold mining claims passed upon or decided. Leonard's declaration of intention confirmed his original title; it perfected his title as completely as it would had he made such declaration prior to making the location. But if Leonard could not locate a claim, his inability, if not

cured by his subsequent act, would not operate to invalidate the entire location, but only his interest therein.

Argument for respondent:

I. This action is brought under the act of the legislature of this State, Feb. 10, 1873: Comp., L., Sec. 1674. The object of the action is solely to determine which party has the better right of possession to the quartz vein in controversy under the act of Congress of May 10, 1872, providing for the acquisition of mining title.

The quartz vein is the principal subject of contest. The surface ground is a mere incident thereto. The incident, of course, must follow the fate of the principal matter, and to lose sight of the quartz vein, and give entire attention to the surface, is to proceed upon false premises, and liable to lead to false conclusions. A person making a location upon a quartz vein is entitled to follow that vein wherever it goes, the distance that his claim extends by linear measurement upon the vein. The boundaries of the surface, which the location of said vein is allowed to hold as incident to the vein, must be regulated according to the direction of the vein, and, of course, can never be definitely determined until the course of the vein has been ascertained by actual exploration; hence it must inevitably happen that the boundaries of the surface, or incident, shall sometimes be changed so as to correspond with the course of the vein or principal matter, when that course shall have been ascertained. Unless the appellant has the better right to the quartz vein in question, he has no right to the surface which can avail him in this proceeding.

The precise direction in which the vein ran was not, and could not, be known until the tunnel had been constructed, and only then to the extent that the vein had been traced thereby. While the Golden Fleece Company was in the possession of and had its works upon this vein, the defendant applied for a patent under such description as made it necessary for the plaintiff to protest, and bring this suit for the protection of its title to and possession of the quartz vein in controversy.

II. There was no error in denying appellant's motion for

a nonsuit. The authority cited from Wisconsin can not be regarded, because it is in contravention of the latest decision of this court upon the same subject, and because it has no application to this case.

III. There was no error in the refusal of the district court to submit special issues to the jury. The Practice Act did not make it obligatory upon the court to submit to the jury the questions proposed by the defendant.

IV. Neither of the instructions mentioned in the appellant's brief, as asked by defendant to be given to the jury, and which were refused, was wholly correct; and if not, they were properly refused: 16 Cal. 79.

V. Leonard was proven to have been an alien at the time of making the location of the Golden Fleece; and, therefore, was rendered incompetent, under the laws of the United States, to acquire any mining right by location, and his participation in that location rendered it void. The power of the court to try and determine the competency of locators to make a valid location is beyond question. The act of Congress of May 10, 1872, explicitly declares that all valuable mineral deposits in land belonging to the United States shall be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase by citizens of the United States and those who have declared their intentions to become such. The effect of this provision must be to exclude all persons not belonging to either class described in that section. Under any rule of interpretation, the language of that section forbids the exploration, occupation, or purchase of any mineral deposits, or land mentioned therein, by any alien not having declared his intention to become a citizen of the United States; and also forbids any obstruction on his part to the free and open exploration, occupation, and purchase of such deposits and lands by those who may be qualified thereto. This amounts to a license or warrant on the part of the United States government to exclude from the public lands mentioned in said section all persons shown to be incompetent to explore, occupy and purchase the same. In the case of *Beckner v. J. B. Coates*,¹ in September last, the

¹ Sickel, 87.

Secretary of the Interior affirmed the decision of the general land-office, holding that an alien can hold no title in mining claims before patent issued. If that interpretation of the law is correct, then so far as Leonard is concerned, who was clearly proven to have been an alien, the Golden Fleece ledge and ground were open and free for exploration, occupation, and purchase when the location of McDonald was made, under which the plaintiff claims.

Our State constitution and laws, or the course of proceeding in the United States land office, or the various cases and opinions referred to in the reports, are entitled to no consideration in construing this section. The incompetency of Leonard invalidated the whole claim. We admit the principle that whenever the good can be separated from the bad, in many cases a portion may be upheld while the remainder falls; but we also insist that the rule is equally well settled, that when the good can not be separated from the bad, the whole must fall. Now, in this case, it seems to us beyond comprehension how the interest of the other four locators can be upheld while that of Leonard fails. To whom shall the seven hundred and fifty feet assigned to Leonard be allotted; or, if allotted to his co-locators, then in what proportion to each of them, and upon what conditions, are questions which counsel for appellant has not undertaken to answer. Nor are they capable of any answer under any recognized principle of law. They present such difficulties as the courts do not grapple with for the purpose of relieving from the consequences of a fraud.

BEATTY, J.

The defendant herein having made application for the government title to certain mining ground, the plaintiff filed an adverse claim to a portion of the premises, and thereupon commenced this action to determine the right of possession of the ground in controversy. The trial of the case in the district court resulted in a verdict and judgment for the plaintiff and the defendant appeals from the judgment, and also from an order denying its motion for a new trial. The assignments of error are very numerous, but only a few of the ques-

tions involved have been fairly argued, and we shall confine ourselves to those questions.

The substance of the complaint is: That the plaintiff is the owner and in the actual possession of a claim of fifteen hundred linear feet of a lode called the Golden Fleece, and of a surface claim of three hundred feet on each side thereof; that the defendant claims some estate or interest in the said premises adverse to the plaintiff, and has applied for a United States patent for a portion thereof; that the plaintiff has protested and filed an adverse claim, and that the proceedings in the land-office have been suspended until the rights of the parties can be determined in a court of competent jurisdiction. It is further alleged, on information and belief, that defendant's claim to the ground is based upon certain pretended mining locations (describing them) which are said to be invalid by reason of the failure of the locators to comply with the law in making and recording them. Wherefore the plaintiff prays to be adjudged the owner and entitled to the possession of the disputed ground.

The answer admits an adverse claim to the ground described in the complaint, denies plaintiff's possession and right to the possession, and sets up a valid title to the ground described in defendant's application for a patent.

The testimony adduced at the trial showed that the two claims described in the complaint and answer, respectively, lie across each other. The plaintiff's claim extends from northeast to southwest fifteen hundred feet in length by six hundred in breadth, and the southwest end covers the middle of the defendant's claim, which extends from north to south, fifteen hundred feet in length, by six hundred feet in width.

At the trial the plaintiff introduced evidence which, if true, established the following facts, among others: The plaintiff is a Nevada corporation; at and before the commencement of this action it was mining upon a well-defined lode of silver-bearing quartz, the croppings of which were exposed within the clearly-marked boundaries of its surface claim; that said boundaries embraced a portion of the ground claimed by the defendant, and that it had done some work within the lines of the disputed ground.

At the close of plaintiff's testimony the defendant moved

for a nonsuit, and the ruling of the court denying the motion is assigned as error. The specifications under this head correspond to the grounds of the motion. The first of these, to which our attention is particularly invited, was stated as follows: "That the title of defendant, as pleaded by plaintiff, is not proven, or proven invalid."

The appellant contends that in an action of this sort the plaintiff, to escape a nonsuit, must not only prove affirmatively a *prima facie* right to the disputed premises, but must also plead and prove the particulars of defendant's claim, and prove that it is invalid. This is the doctrine of *Blasdel v. Williams*, 9 Nev. 167, which was overruled in *Scorpion Company v. Marsano*, 10 Nev. 379. We are asked to again review the question and to restore the rule of the former case upon the authority of a recent decision in Wisconsin: 38 Wis. 320. That case, on examination, will be found to give only a partial support to *Blasdel v. Williams*, and we are very confident that, taking it into account, our last decision will be found to be supported as well by the number of decided cases as by the reason of the thing. A review of the question is, however, wholly unnecessary in this case, which is governed by the provisions of section 1674¹ of the compiled laws, passed February 10, 1873, and evidently designed to supplement section 2326 of the Revised Statutes of the United States, passed May 10, 1872. Under these laws the pendency of a contest in the land office, with respect to a mining claim, gives our district courts jurisdiction to determine the right of possession as between the adverse claimants. The contestant, whether he is in or out of possession, must commence his action to determine the right within thirty days after filing his adverse claim. It would be absurd to hold that, if he happens to be the party in possession, and therefore presumably entitled to the possession, judgment

¹ § 1674. In all actions brought to determine the right of possession of a mining claim, or metalliferous vein or lode, where an application has been made to the proper officers of the government of the United States by either of the parties to such action for a patent for said mining claim, vein or lode, it shall only be necessary to confer jurisdiction on the court to try said action, and render a proper judgment therein, that it appear that an application for a patent for such mining claim, vein, or lode has been made, and that the parties to said action are claiming such mining claim, vein, or lode, or some part thereof, or the right of possession thereof.

must go against him, in favor of a party out of possession, unless he not only proves his own right affirmatively, but disproves the claim of the defendant by negative testimony.

The only sensible construction of the law is, that each party must prove his claim to the premises in dispute, and that the better claim must prevail. Actual possession, admitted or proved, makes out a *prima facie* case for the contestant, and throws upon the defendant the burden of proving a superior right in himself.

Another ground of the motion was, that the plaintiff had not shown that it was in the actual possession of the premises in controversy at the time the action was commenced.

Such proof was not necessary. A right to the possession was all it was essential for the plaintiff to prove. The complaint, it is true, alleged actual possession in the plaintiff, but that allegation was not essential to the statement of a good cause of action under the statute: C. L., Sec. 1674; and the failure to prove it, if there had been a failure, would only have imposed upon the plaintiff the necessity of showing by some other means a right to the possession. But, in fact, the plaintiff did prove possession. It proved a clearly-defined surface claim, surveyed and marked by a United States surveyor in accordance with law, including a quartz lode running with the claim, and work on the vein inside of the surface claim, and within the lines of the disputed ground. This alone was enough to put the defendant on proof of its right. The plaintiff, however, went still further. It introduced testimony intended to show a location of the Golden Fleece claim in October, 1873, by one McDonnell, and conveyances from him. One of the grounds of the motion for nonsuit was the alleged invalidity of this location by McDonnell. There was no proof that McDonnell was a citizen, or had ever declared his intention to become a citizen. There was no proof that in making his location he had complied with any local rules or regulations of the miners of the district. The record of claim was not in accordance with the requirements of the United States mining law. When the surface lines of his claim were first marked out, the ground in controversy was already included.

in the well-defined boundaries of the defendant's surface claim.

So far as the motion for a nonsuit is concerned, it has been shown that the validity of McDonnell's location is of no consequence. The plaintiff could have rested on its actual possession without claiming anything under McDonnell. But the validity of his claim is likely to be a question in any future trial of the case, and for that reason some of the objections to it will be considered. As to the first point, it is clear that an alien who has never declared his intention to become a citizen is not a qualified locator of mining ground, and he can not hold a mining claim, either by actual possession or by location, against one who connects himself with the government title by compliance with the mining law. This much is certain, but it is not so certain that proof of citizenship must be made in order to show a valid location. It may be that the locator, in the absence of proof, will be presumed to be a citizen. This is a question, however, which has not been argued and will not be decided.

As to the second point, it is true there was no proof of compliance with any local rules on the part of McDonnell, but there was no proof of the existence of any local rules at the time the motion for a nonsuit was submitted. The defendant afterward proved the existence of certain local rules of the mining district, but the court knew nothing of those rules when deciding the motion. The mining laws of the United States (R. S. Secs. 2318 to 2346), recognize and sanction the custom long prevalent among the miners of this coast of organizing mining districts and adopting local laws or rules governing the location, recording and working of claims. Existing rules not in conflict with State or federal legislation are ratified, and express authority is conferred upon the miners in their several districts to adopt other rules, subject to certain specified restrictions. Miners are thus permitted to make rules in addition to those prescribed by Congress; but, in order that mining claims may be held and the government title acquired, it is not essential that mining districts should be organized and local rules adopted. All that the government requires to be done in order to obtain its title or license to occupy is pre-

scribed by the law; and, in the absence of local rules, a compliance with the public law will secure the claim. The miners, in their respective districts, may, if they choose, exact something more, but they are not obliged to do so, and no court, in the absence of proof, will presume that they have done so. In this case, the plaintiff had shown everything necessary to make a good claim under the United States mining law; that is to say, it had shown work on a vein within a well-defined surface claim not exceeding fifteen hundred feet in length and six hundred feet in width: R. S. Secs. 2320, 2324. It was not necessary to prove any record of the claim. A record is not required by the United States law, but is to be provided for, and its effect defined, by the local law. All the public law requires is that a record, to have any effect, must contain an accurate description of the *locus* of the claim, along with some other essentials. This question, however, will receive more particular attention in another connection. As to the last specification in this ground of the motion, it is true that the plaintiff's testimony did show that when its claim was surveyed and the boundaries marked, the defendant's boundaries had already been defined so as to include the ground in controversy. But the court could not assume, in deciding the motion for a nonsuit, the existence of the other facts essential to the validity of defendant's claim. It is a mistake to suppose that mining ground can not be located if some other claimant has put stakes around it. The first claimant may not be a citizen, or otherwise capable of holding against a qualified locator, and he may not have complied with other requirements of the law, which are just as essential as the marking of boundaries. He may have forfeited, or he may have abandoned his claim. In any such case the ground is open to any citizen of the United States as completely as if no stake had ever been planted upon it. There were still other grounds specified in the motion for a nonsuit, but they have not been argued, and will not be discussed in this opinion. We think the court did not err in overruling the motion.

The next assignment of error relates to the admission, against the defendant's objection, of a pretended record of McDonnell's location of the Golden Fleece. The principal

ground of objection to this so-called record was that there was no proof that the claim was situated within an organized mining district, with rules providing for the making of records. This was a good ground of objection. Proof of a record is totally irrelevant without proof of some regulation making a record obligatory, or giving it some effect. The public law does not of itself create any such office as that of mining recorder. Neither does it make the recording of claims obligatory, or give to a record any effect. This is a matter left to the miners of the respective districts. If they make no rules requiring a record, none is required; if they give no effect to a record, evidence of a record is irrelevant. Another ground of objection to this record was, that it contained no description of the claim by reference to natural objects or permanent monuments. This also was a good ground of objection, and would have been good even if there had been proof of a regulation of the district requiring a record. The mining law allows the miners to provide for the recording of claims, and no doubt it was the intention of Congress that such record should have some practical effect—such as, for instance, to hold the claim for a reasonable time, until the vein could be so developed as to admit of an intelligent marking of the surface boundaries. But in order that the record should have such or any effect, it is imperatively required that it shall fix the *locus* of the claim by reference to natural objects or permanent monuments: R. S., Sec. 2324. The court erred in overruling the objection to the record.

The motion for a nonsuit having been overruled, the defendant introduced evidence to show the existence and organization of the Peavine mining district, and its code of written regulations providing for a recorder and defining his duties. It also proved the posting and recording, by one Leonard and four others, of a notice of location of the claim described in its answer and in its application for a patent, and that said claim was situated in the Peavine district. It proved that Leonard and his co-locators complied with the United States laws and the local rules in locating, recording and working their claim. The testimony showed that their notice of location was posted on the ground August 11, 1873, while McDonnell's location of the Golden Fleece

was not made till October 4th following. If, therefore, the Leonard location was valid and was kept good by compliance with the laws as to working, marking of boundaries, etc., the defendant, if it had been allowed to prove a conveyance from Leonard and his co-locators, would have shown an older and consequently a better title to the premises than that of the plaintiff, even allowing McDonnell's location to have been made in conformity to the laws.

But Leonard, who was a witness for the defendant as to the location and recording of its claim, stated, on cross-examination, that at the date of the location he was not a citizen, and had never declared his intention to become one. The court thereupon decided that the location of the Leonard claim was wholly void, and excluded all evidence in regard to it, including the deeds of conveyance from Leonard and his associates to the defendant.

This ruling was erroneous. In the first place, Leonard's testimony, that he was not a citizen when he made the location, even if it had been more positive than it was, was not conclusive against the defendant. He had parted with all his interest in the premises, and his admissions were not binding on his grantees. The question of his citizenship was one for the jury, not the court, to decide (unless indeed the presumption was against his being a citizen, but as to this the court assumed the contrary with reference to McDonnell's location), and should have been submitted to the jury under proper instructions as to the effect of a finding one way or the other.

But Leonard's testimony, so far from sustaining the conclusion that he was not a citizen, had an opposite tendency. He said that he was born in New York; that he was taken at a tender age to Ireland, and returned to this country a few years ago. He had been advised that he was not a citizen, and, acting upon this advice, had made a declaration in February, 1874, of his intention to become a citizen. On this testimony alone it should have been found that he was a citizen by nativity.

But, besides this evidence tending to prove that Leonard was a citizen by nativity, besides the evidence that he had qualified himself to hold mining ground by declaring his intention to become a citizen in February, 1874—long before

the plaintiff had taken possession or made a valid location of the ground in controversy—it was proved and admitted that two of Leonard's co-locators (grantors of defendant) were citizens at the date of the location. In order, therefore, to exclude all the evidence as to that location, and its conveyance to the defendant, it was necessary not only to hold that Leonard's claim was void, but to hold that the claim of his co-locators was void also. This the court did in fact decide, and, we think, erroneously.

Under the law a single qualified locator may take up fifteen hundred feet of a vein with the surface ground extending three hundred feet on each side of the croppings. An association of a dozen or a hundred locators can take up no more. Here were five locators, claiming in common no more than any one of them might have taken. They claimed fifteen hundred feet of the vein, with the surface ground allowed by law. By figures placed opposite their respective names, as signed to the notice of location, they indicated the number of undivided feet that each was to own. Leonard's share was seven hundred and fifty feet. The rest was divided among his four co-locators, two of whom at least were citizens. Suppose, then, Leonard was not capable of making a location, how does that fact render the whole claim void? It is said that Leonard's claim was a fraud upon the law. But, admitting his claim to have been fraudulent, there is not a particle of evidence tending to show that his co-locators were aware of his disability, or that they were colluding with him in his attempted fraud. They certainly were not guilty, and it would be a harsh rule indeed to make them suffer for the fraud of Leonard, merely because they were willing to admit him to a share in a location which they might have taken to themselves alone. The law in such cases will be sufficiently vindicated by holding that the alien's claim is void. And this course will not lead to the difficulties apprehended by counsel for respondent. It is not necessary to decide what would become of his claim. It might be open to location by a stranger, or it might have to be distributed among the qualified owners. Counsel for respondent think it would have to be distributed among the qualified owners unless the whole claim is held void, and, assuming that there is no rule of law by which

such distribution could be made, they argue that the only alternative is to declare the claims of all the locators void. We think, however, that there would be no greater difficulty in making the distribution, if it had to be made, than there would be in the case provided for in the mining law where one of several co-owners refuses to contribute his share of the work necessary to preserve the claim.

The court erred, therefore, in excluding the conveyances from the locators of the Leonard claim; first, because the evidence would have warranted the jury in finding that Leonard was a citizen; second, because he declared his intention to become a citizen before he conveyed to defendant, and it was a question for the jury to decide whether at the time he thus became qualified to hold a mining claim, plaintiff or its grantors had acquired any adverse rights; third, because if Leonard had no title to convey, his co-locators did have an undivided interest in the location at least, if not the whole of it, and did convey to the defendant.

For this error the judgment must be reversed and the case remanded for a new trial. But the court also erred in deciding another important question, which must arise at the next trial, and which ought, therefore, to be noticed in this opinion.

There was testimony going to show that when the Golden Fleece was originally located the vein was supposed to run northwest and southeast, and that the surface claim was so marked out on the ground; that subsequently and long after the Leonard claim had been located, according to its present boundaries, and even after the official survey made for the purpose of the application for a patent, the plaintiff, discovering that the vein ran northeast and southwest, swung its claim around almost at right angles to its former position, had a new survey made and planted its present boundary stakes so as, for the first time, to include any portion of surface ground in dispute. In view of this testimony the defendant asked several instructions, which were refused, to the effect that the plaintiff was bound by its original marking of boundaries in favor of a subsequent locator.

Counsel for respondent justify the refusal of these instructions, on the ground that its location was of the vein, as the

principal thing, and of the surface as a mere incident thereto, and that when the mistake in the direction of the vein was discovered, it had a right to change the lines of its surface claim, even though by so doing it encroached upon the claim of a subsequent locator. Undoubtedly, this was the law as applied to locations made under the miners' rules formerly in force. Under those rules a location could be made, and commonly was made, by posting a notice in reasonable proximity to the point at which a lode was discovered or exposed, stating that the undersigned claimed so many feet of the vein extending so far, and in such direction or directions from the discovery point, together with the amount of adjacent surface ground allowed by the rules of the district. This notice, so posted, had the effect, under the rules, of holding the ground described a certain length of time—commonly ten days—after which it was necessary to have the notice recorded by the district recorder in order to keep the claim good, and to follow up the record by doing a certain amount of work every month or every year. This was substantially the mining law of the Pacific coast for the location, recording and holding of claims; and a compliance with these rules stood in the place of actual possession within defined boundaries and was allowed the same effect. The claim was defined by the terms of the notice and not by posts and monuments erected on the surface of the earth. The notice claimed so many feet of the vein with the adjacent surface. If subsequent developments demonstrated that the course or strike of the vein differed from that mentioned in the notice, the locator was still allowed to follow the vein to the extent claimed, because there was no difficulty in reconciling the description in the notice with the deflection in the vein from its apparent course at the discovery point, and because the claim in fact was of so much of the vein wherever it might run. As the surface ground allowed by the miners' rules was a mere incident to the vein and was to be adjacent to it, and was never marked by posts or monuments any more than the vein itself, it followed, as a matter of course, that when the true course of the vein was discovered the surface ground was located in conformity to it.

In this case, however, the plaintiff does not base his claim

on compliance with any mining rules. It has proved nothing more than an actual possession of its claim, or, at most, a substantial compliance with the United States law in marking out a surface claim and working on the lode within its boundaries. Under that law it can not be doubted that it is bound by the lines of its surface claim in favor of a subsequent locator. It is true that the vein is the principal thing and the surface is but an incident thereto; but it is also true that the mining law has provided no means of locating a vein except by defining a surface claim, including the croppings or point at which the vein is exposed, and the part of the vein located is determined by reference to the lines of the surface claim. Those lines are fixed by the monuments on the ground, and they can not be changed so as to interfere with other claims subsequently located.

We wish to be clearly understood as giving a construction to the law of Congress, standing alone and unaided by any local rules. Under the law, miners are allowed to make rules in regard to the location and recording of claims; and it would seem to have been the intention of Congress to sanction some such rules as formerly prevailed on this coast, under which the posting of a notice would hold a claim on the vein a reasonable time, during which the locator might make a survey of the location point with reference to natural objects or permanent monuments in the neighborhood. He could then append a sufficient description of the *locus* of his claim when he had it recorded, and the record might then be allowed to hold the claim for a further reasonable time, until the vein was so far developed as to admit of a correct establishment of the surface lines. This would seem to be a more reasonable view of the meaning of that provision of the law allowing miners to make supplementary rules than that taken by the commissioner of the land office. See his instructions to surveyors, etc., dated February 1, 1877. He appears to think that no regulation of the miners can dispense with the marking of the boundaries of the surface claim as the very first step toward a location. If this is so, it is difficult to see what office a notice of location and the recording of it have to perform. The requirements of the law as to what the record shall show are evidently designed to fix the *locus* of the

claim, in order to prevent floating. But the monuments defining the claim on the ground answer this purpose better than the record, and if they are to be erected in the beginning, there can be but little use ever to make a record; and, in fact, it is not made obligatory by the law, as we have shown in another connection.

These questions, however, in regard to what rules the miners may make, are not involved in this case, and are not decided. What has been said in regard to the matter has been said only for the purpose of avoiding any misunderstanding of the points that are decided. All that is decided in respect to this last assignment of error is, that under the law of Congress, unaided by any supplementary miners' rules, there is no way of locating a quartz vein except by marking out surface lines, and that when these lines have been marked they can not be changed so as to take in ground that has been located by others prior to such attempted change.

The judgment and order appealed from are

Reversed and the cause remanded.

HAWLEY, C. J., concurring :

I concur in the judgment of reversal, upon the grounds stated in the opinion of the court.

As to the last point discussed in the opinion, I agree that the original locator can not swing his surface location so as to claim any other surface ground. He is, so far as the surface ground is concerned, bound by the lines designated upon the surface: U. S. Mining Laws, Sec. 2322. But I do not believe that under what seems to me to be a fair and reasonable construction of section 2322, it was the intention of Congress, by the passage of the mining laws, to prohibit the first locator of a quartz lode from following his vein, with all its dips, spurs, angles and variations, along its course, to the full number of feet expressed in the notice of location, not exceeding fifteen hundred feet and not extending "through the end lines of his location," in whatever direction it runs, irrespective of the vertical side lines of the surface boundaries. Although the question as to the right of a party thus to follow his lode is not directly denied in the opinion, yet I do not

desire to indorse any of the reasoning of the court, which would seem, even by inference, to be at variance with the views I have expressed.

Note.—A second trial resulted in a second verdict for plaintiff, and defendant again appealed, but the appeal was dismissed because not perfected in time, without any further reference to the facts of the case: *Same v. Same*, 15 Nev. 450.

SAMUEL SMITH ET AL. V. J. M. RICHARDSON ET AL.

(2 Utah, 424. Supreme Court, 1877.)

Practice in chancery—Disregarding findings of jury.¹ The power to disregard or modify the findings of a jury in a chancery cause is inherent in the court; the object of the verdict being not to decide the case, but to instruct or advise the conscience of the chancellor, and it is no reason for disturbing the action of the court that in passing upon the whole case it disregarded the findings of the jury.

Rebuttal defined. Rebutting evidence is such as explains or counteracts evidence that comes out on the defense. That is not rebutting testimony which mainly supports the case stated in the complaint, and only incidentally explains or repels the evidence in behalf of the defense.

New trial. The rejection of material testimony in rebuttal is a proper ground for new trial.

Appeal from the District Court of the Third Judicial District.

The facts are stated in the opinion of the court.

BENNETT & HARKNESS, for appellants.

No brief on file.

MARSHALL & ROYLE, for respondents.

When fraud enters into a cause, either as a ground of complaint or defense, a wide latitude is allowed in the introduction of evidence, either *pro* or *con*. We would call the particular attention of this court to the wide latitude allowed de-

¹ *McGan v. O'Neil*, 5 Colo. 58.

fendants in the trial below, and in strong contrast therewith the strict, iron-clad rule applied to plaintiffs throughout. Although we deem it almost unnecessary to support the above proposition of law by precedents, yet we will cite the following authorities: *Reinhard v. Keenbartz*, 6 Watts, 93; *Bell v. Bed Rock*, 36 Cal. 218; *Willson v. Cleaveland*, 30 Cal. 195; *Zacharias v. Franklin*, 12 Pet. 163; *Kauffman v. Swar*, 5 Pa. St. 230; *Craig's App.* 77 Pa. St. 448.

The evidence offered by plaintiffs and excluded was strictly rebutting evidence, and as such was admissible.

Rebutting evidence, says Bouvier, v. 2, p. 424, is that which is given by a party in the cause to explain, repel, counteract or disprove facts given in evidence on the other side. And this exact definition is sustained in Peters Cir. Ct. Rep. 235.

On this question of rebutting evidence we call the attention of the court to the following decisions: *Sample v. Robb*, 16 Pa. 320; *Blair v. Marks*, 27 Mo. 579; *Dodge v. Dunham*, 41 Ind. 192; *Craighed v. Wells*, 21 Mo. 404; *Wilson v. Jamieson*, 7 Pa. St. 126.

And we are pleased to find that the superior courts distinctly hold that, although the order of the introduction of evidence is largely a matter of discretion, yet the court ought generally, whenever the ends of justice require it, to admit the testimony: *Lisman v. Early*, 15 Cal. 199; *Gelpin v. Consequa*, 3 Wash. C. C. 185.

In such a case as the one at bar, under the Code, the judge could only enter judgment in accordance with the verdict. The Code is explicit on this point, and speaks in no uncertain or doubtful language: Code of Utah, §§ 156, 181, 192 *et seq.*

The mode of obtaining a new trial under the Code is the same in equity as at law. Our Code has provided the manner of setting aside a verdict, as also findings of a referee or court, and that must be followed: *Duff v. Fisher*, 15 Cal. 379; *Allen v. Hill*, 16 Cal. 117; *Garwood v. Simpson*, 8 Cal. 108; *Peabody v. Phelps*, 9 Cal. 213; *Gagliardo v. Hoberlin*, 18 Cal. 396; *Bates v. Gage*, 49 Cal. 126.

Under the old chancery practice the course would have been different from the one followed in this case, yet even the

old practice was not followed: 2 Daniells' Ch. 1121; *Devall v. Burbridge*, 6 Watts & Ser. 529; 1 Waite's Pr. 463.

But we do not rest here. We respectfully ask the court for a judgment in accordance with the findings of the jury, and cite the following precedents and authorities for this request: Utah Pr. Act, § 337; *Cain's Heirs v. Young*, 1 Utah, 362; *Gahan v. Neville*, 2 Cal. 81; *Bidleman v. Kewen*, 2 Cal. 248.

BOREMAN, J., delivered the opinion of the court :

The appellants (defendants below) made their application for patent to the Teresa mine, and respondents filed their adverse claim thereto, alleging their rights thereto under the Richmond mine location; and thereupon, within the time prescribed by law, respondents brought their bill in chancery to quiet title. Issues out of chancery were submitted to a jury, and the jury found for the plaintiffs on all the issues. The court below disregarded the findings of the jury, made other findings, adopting a portion of the findings of the jury, and, on motion, gave judgment for the defendants. The plaintiffs filed their motion for a new trial, which being by the court sustained, defendants appeal to this court.

The court below granted a new trial upon two grounds, one being that the court had erred in making new findings and disregarding those of the jury.

The power to disregard or modify the findings of a jury in a chancery cause is inherent in the court, the object of the verdict being not to decide the case, but to instruct or advise the conscience of the chancellor. And this rule is not of modern origin, but is hoary with age and plainly laid down and recognized all through the books : 2 Dan. Ch. Pl. & Pr. § 1147; Adam's Eq., side pp. 376-377; 3 Greenl. Ev., § 261 *et seq.*; *Sibert v. McAvoy*, 15 Ill. 108; *Ward v. Hill*, 4 Gray, 593; *Garsed v. Beall*, 2 Otto, 684.

But it is claimed that such a rule does not exist under our Code practice. If the Practice Act, therefore, does not do away with this rule, it must be considered as still standing and in full force. The binding force of the rule has been recognized in California at various times, although the Code

practice has been in force there during the time of such decisions: *Still v. Saunders*, 8 Cal. 281; *Duff v. Fisher*, 15 Cal. 376; *Bates v. Gage*, 49 Cal. 126; *Van Vleet v. Olin*, 4 Nev. 95.

In the case of *Wingate v. Ferris*, 50 Cal. 105, the doctrine is fully recognized. That was a case of a general verdict in an equity case. Judgment was entered in accordance with the verdict, and a motion for a new trial made and sustained. The appeal was, as in the case at bar, an appeal from the order sustaining the motion for new trial. The Supreme Court of California in that case overruled so much of the order as granted a new trial, and sustained so much thereof as vacated and set aside the judgment, and it then directed the court below to determine the issues of fact upon testimony already taken, or to open the case for further testimony, as the court below in its discretion might deem proper. It thus approved the action of the court below in setting aside the verdict, but says that instead of granting a new trial, the court should have proceeded to make findings of fact.

But our Practice Act goes further than the statutes of California or Nevada, and says: "Chancery cases may be tried by the court, with or without the findings of a jury, upon issues designated by the court:" Civ. Pr. Act, § 181. Yet the Supreme Court of the United States, agreeing with the California and Nevada decisions, recognizes the existence of the doctrine that the findings of a jury in chancery cases is merely advisory, even where the broad provision of our statute does not appear to exist. In *Basey v. Gallagher*, 20 Wall. 670, a case which went up from Montana, the court says that "the relief which equity affords, must still be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory."

There is nowhere in the books, so far as we have been shown, any recognition of the doctrine that this rule respecting the advisory character of the findings of the jury is applicable only in cases where but parts of the issues are submitted to the jury. In the case of *Duff v. Fisher*, above referred to, all the issues were submitted, and in the case of *Basey v. Gallagher*, the whole case was submitted, without objection from either side

But if the doctrine were correct, it could not affect the case at bar, for here only a portion of the issues were submitted. Other issues were settled by the parties or by the pleadings, and on all of these and the evidence the whole case was passed upon by the court. Because the court, in thus passing upon the whole case, disregarded the findings of the jury, is no reason why that action of the court should be disturbed.

The other reason for granting the new trial, was that the court had erred in rejecting evidence to show that the location of the Richmond mine was made before the 3d of July, 1870, such evidence being offered in rebuttal after defendants had introduced their testimony.

Rebutting evidence is such as explains or repels, rebuts or counteracts evidence that comes out on the defense. It may incidentally support the case made in the complaint, but that is not rebutting testimony which mainly supports the case stated in the complaint, and only incidentally goes to explain or repel the evidence in behalf of the defense.

In the suit before us, the defendants deny not only that plaintiffs, or those from whom they receive title, ever made their location of the Richmond on the 26th June, 1870, or at any time prior to the 3d day of July, 1870, but also they allege that plaintiffs' notice of location is trumped up, antedated and fraudulent, and several times altered. They introduced evidence to support this charge of fraud, etc. To repel and counteract the evidence of the defense on this point, the plaintiffs offered evidence claimed to be in rebuttal, and this was rejected.

The material parts of the evidence thus offered had reference to the delivery of a piece of ore to be assayed; to the exhibiting of ores by the locators of the Richmond mine on the 26th June; to the contents of the writing on the root of a tree subsequent to the 26th June; to the reception of ore from the locators; to seeing the Richmond mine and fitting therein a piece of the rock, and to the fact of the assaying of ore prior to the 3d July, said at the time to have been from the Richmond mine. These material parts of the rebutting testimony are designated in assignments of error Nos. 9, 10, 11, 12, 14, 15, 16, 17, 18, 19 and 20.

None of this evidence would, probably, be admissible if

offered in chief to support the case stated in the complaint. They only go to repel and weaken the evidence offered by the defense to support the charge of fraud made in the answer. The matters referred to in evidence, as proposed by the plaintiffs, occurred before the 3d day of July, 1870, and before the defendants had made their location, and before it was known that there would be any conflicting claim; and, if the facts were as claimed, the tendency evidently would have been to repel and counteract the effect of the evidence for the defense on the question of fraud. The evidence would no doubt in a slight manner go to support the case of the plaintiffs as made out in the complaint, but this would have been only incidentally. The evidence should have been admitted, but its rejection was such an error as frequently happens in a long, tedious and hotly-contested case. Its rejection, however, may have had a material effect upon the conclusion finally reached, especially when it appears that the weight of evidence admitted before the jury was in favor of the defendants.

The testimony of Morey and Gilman to impeach Davis should also have been admitted, and its rejection was error, as the testimony of Davis justified it. By reason, therefore, of the rejection of this testimony the granting of the motion for a new trial was proper.

The language of the respondents' brief in this case, respecting the judge before whom it was tried, is such as ought never to find its way into any paper before any court. There is nothing whatever to warrant it. Hereafter we hope that no attorney will so far forget himself as to indulge in such remarks. They are not only unjust to the judge who tried the case, but likewise disrespectful to this court.

The order of the court below granting a new trial is affirmed with costs, and the cause remanded for trial in accordance with this opinion.

SCHAEFFER, C. J., and EMERSON, J., concurred.

Note.—The same case was before the court upon trifling points of practice in 1 Utah, 194. Also in 1 Utah, 245, where it was holden that the practice of that Territory allowed an injunction in favor of a defendant upon a proper answer.

BRANDT V. WHEATON.

(52 California, 430. Supreme Court, 1877.)

Bill in Equity—Verdict. In a suit under § 738 of the Code of Civil Procedure, the complaint is to be treated as a bill in equity, and the general verdict of a jury will be disregarded.

Presumption arising from possession. As against a mere trespasser, one in possession of a portion of public land will be presumed to be the owner.

Jurisdiction. But the person in possession will not be entitled to a decree, which will prohibit a third person from obtaining title by purchase from the government, or which decides in advance that he has no right on which to base his application. The respective claims should be asserted in the appropriate tribunals.

The complaint, which was filed September 30th, 1875, averred that the plaintiff was, and had been since 1864, the owner and possessor of a mining claim in the Michigan Bluff District, County of Placer, lying in Buchanan Gulch, and that the defendant wrongfully claimed to own it, and had applied to the United States, in the Land Office at Sacramento, to obtain a patent for it, and that his application was now pending, and that the claim was a placer-mining claim, and a part of the public mineral lands of the United States. The plaintiff asked for judgment, decreeing that he was the owner and possessor of the claim, and that the defendant had no title to it, and that he be perpetually enjoined from asserting any title to it. There was no allegation that the plaintiff had filed an adverse claim in the land office. The case was tried by a jury, and a general verdict rendered for the plaintiff. No special issues were submitted. Upon this verdict the court rendered judgment for the plaintiff, as prayed for. The defendant appealed from the judgment and from an order denying a new trial. The other facts are stated in the opinion.

M. A. WHEATON, in *pro per*.

HALE & CRAIG, for the respondent.

By the COURT :

In the briefs of appellant and respondent this is called "an action to quiet title." It is a suit under Sec. 738 of the Code of Civil Procedure, and the complaint is to be treated as a bill in equity. The general verdict of the jury, therefore, is to be disregarded. If this were the only question to be considered, the cause would be remanded to the court below to find the facts. But the case made by plaintiff simply shows that he is in possession.

As against a mere trespasser, one in possession of a portion of public land will be presumed to be the owner, notwithstanding the circumstance that the court has judicial notice that he is not the owner, but that the government is. This rule has been maintained from motives of public policy, and to secure the quiet enjoyment of possessions which are intrusions upon the United States alone.

But it would be carrying a presumption against the fact to an absurdity to say that one in possession who has not acquired the fee from the government—the true owner—is entitled to a decree, the practical effect of which is to prohibit a third person from obtaining title by purchase, or by appropriate proceedings under statutes of the United States. The respective claims of conflicting claimants may be asserted in the appropriate tribunals established by the Government for that purpose. A decree here in favor of plaintiff would have no effect by way of inducement to the officers of the Land Department of the United States to issue the patent to plaintiff; and if we had the power, it would be an ill advised employment of equity jurisdiction to prevent the defendant from proceeding with his application, or, worse still, to decide in advance that he had no right on which to base his application.

Judgment and order reversed, and cause remanded for a new trial.

SHAFFER V. CONSTANS.

(3 Montana, 369. Supreme Court, 1879.)

Possession—Pleading—Burden of proof as to mineral character of land. S. had been in possession of the land in dispute, claiming it as a mill-site, for ten years before this suit, and several years before C. located the same, but had failed to designate the boundaries by any monuments. The gulch had been returned to the U. S. Land Office as mineral land, and had been worked as such, both above and below the disputed premises, but there was no other testimony tending to show that the tract in controversy contained any minerals. C. applied for patent, and was adversed by S. *Held*, that S. had the right of possession to the lands in controversy, and was not called upon to prove that they were non-mineral. *Held*, that C. having failed to allege that he had complied with the mining rules of the district where the land was situate, was not entitled to a patent.

Mill-site against placer. An adverse claim may be filed and maintained by the claimant of a mill-site against an application for patent on a mining claim.

E. W. & J. K. TOOLE, for appellant, who was defendant below.

CHUMASERO & CHADWICK, for respondent, who was plaintiff below.

Appeal from the District Court, Lewis and Clarke County, Third Judicial District.

The facts are stated in the opinion.

BLAKE, J.

The respondent brings this action to determine his right to the possession of a certain tract of the public domain of the United States. The issues were tried by the court without a jury, and the following facts appear in the findings:

The respondent had enjoyed the possession of the land for the period of ten years before the commencement of this action, and had and used an arastra thereon. Oro Fino gulch was discovered and portions thereof were mined for the precious metals before the occupancy of the respondent. It was impossible to decide whether the channel of this gulch was

within or outside of the land in dispute, although the arastra appeared to be in the bed of the gulch. The appellants located a part of the gulch, including the premises of the respondent, several years after the occupation thereof by the respondent, but before the mill-site had been designated by any marks or monuments. The gulch was returned to the United States land office as mineral land, and has been mined to one point one thousand feet above, and also to another point two thousand feet below the arastra. The intermediate space of three thousand feet has not been mined or worked on account of the obstacles in finding the bed rock. There was no other testimony tending to show that the tract in controversy contained any minerals.

The court rendered judgment that the respondent was entitled, as against the appellants, to the possession of the mill-site.

It appears from the pleadings that the appellants filed their application in the United States land office in Helena, in this Territory, to enter a parcel of placer mineral land in said gulch. The respondent filed his adverse claim to the part, which has been mentioned, and then commenced this action.

The appellant contends that the only right of the respondent to the premises is under his claim to a mill-site, which can not be maintained on mineral land; and that therefore the respondent must prove that the same is non-mineral. We must determine, in the first place, whether the respondent can be treated as an adverse claimant according to the statutes of the United States respecting placer mining claims.

In the 420 *M. Co. v. Bullion M. Co.*, 3 Saw. 634, Mr. Justice SAWYER says: "The party who at the time can maintain his right to the claim in the courts of the country as against any person but the United States, under the local laws, customs, rules and regulations, is the party upon whom Congress intended to confer the right to purchase, no matter how that right originated, if, under such laws and customs and decisions of the courts, he has the present right. And this is simply a right to purchase—a privilege given to the party, of which he may avail himself or not, exactly like a pre-emption law, and founded upon similar reasons and policy." In *Chapman v. Toy Long*, 4 Saw. 28, it is held that the locator of a

mining claim "need not take any steps to purchase the land or obtain a patent for it."

The assistant attorney-general of the United States, in his opinion in *Becker v. Central City*, a subject of controversy arising in Colorado, says: "Possession is one of the elements of title, and is made by this statute a necessary subject of inquiry. If found to be in any one other than the claimant, it is a bar to the issuance of a patent, at least until adjudged wrongful in the manner pointed out in the sixth section.

* * * In the present case the application for a patent includes the surface and soil, as well as the mineral. I am of the opinion that the persons in possession of this surface are adverse claimants, and have an adverse claim within the meaning of this law, and are entitled to be heard in the local courts before patent is issued." Weeks on Mineral Lands, § 148.

Under the laws of the United States the proprietor of a lode may obtain a patent to non-mineral land, which is used for mining or milling purposes; and the owner of a quartz mill or reduction works, who does not possess a mine in connection therewith, "may also receive a patent for his mill-site" in the same manner as said proprietor: U. S. Rev. Sts. § 2337. The adverse claimant is required to show "the nature, boundaries, and extent of such adverse claim," and "commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession." U. S. Rev. Sts. § 2326.

The respondent is not seeking to obtain a patent to his mill-site from the United States, and can not be compelled to be a purchaser thereof. He has stated the "nature" of his adverse claim, and we are satisfied that he had the "right of possession" to the lands in controversy upon the trial in the court below. In this inquiry, the character of the premises does not affect the rights of the respondent, and he was not called upon to prove that they were non-mineral.

The appellants do not allege in their answer that they have complied with the mining rules, customs and regulations, of the mining district in which Oro Fino gulch is situate. They are not entitled to receive a patent to the tract, which has been claimed by them, if this fact is not established. It has

been adjudged correctly that the respondent has the right to occupy the land on which his arastra is situated, as against any title which has been asserted by the appellants.

Judgment affirmed.

THE FRANK G. & S. MINING CO. V. THE LARIMER M.
& S. Co.

(1 Colorado Law Reporter, 495. U. S. Circuit Court, 1881.)

Jurisdiction of U. S. Courts. An action brought in support of an adverse claim, filed against the issuing of a patent to mineral land, is a case which involves the construction of acts of Congress, and is therefore removable into the federal court, under act of March 3, 1875.

WELLS, SMITH and MACON, for plaintiff.

T. A. GREEN, for defendant.

The action was ejectment, brought under section 2326 of the Revised Statutes of the United States, in support of an adverse claim, filed against the application of the Larimer Company, for patent to a mining claim.

It had been brought in Lake County District Court, and was removed upon petition into the Circuit Court of the United States.

The following opinion was delivered upon motion to remand.

MILLER, A. J.

The defendant made application for patent for a mining claim in Lake county, to resist which plaintiff filed in the land office an adverse claim, and thereupon filed complaint in the district court for Lake county.

Defendant, after answer, filed a petition for a removal of the cause to the Circuit Court of the United States, on the ground that the subject-matter of the action arises under the

laws of the United States, and the case was removed accordingly.

This hearing is of a motion to remand the cause to the State court for trial. The act of Congress of March 3, 1875, provides that the "United States Circuit Courts shall have original jurisdiction of the subject-matter of all cases arising under the constitution and laws of the United States." It is impossible that such an action as this can be determined without reference to, and involving a construction of the mining laws of Congress. The questions involved necessarily arise under the laws of the United States; and hence, this court has original jurisdiction of the subject-matter of the action, and the case was properly removable. The motion to remand must be denied.

1. Effect of failure to file adverse claim: *Eureka Co. v. Richmond Co.*, 4 Saw. 302, *Post* LODE; 420 *M. Co. v. Bullion Co.*, 3 Saw. 659, *Post* PATENT; *Chapman v. Toy Long*, 4 Saw. 28, *Post* ALIENS.

2. Suit to sustain, under Utah Code: *Houtz v. Gisborn*, 1 Utah, 173, *Post* CLAIM.

3. Application for patent is a summons to all persons to file adverse claim: *Wolfley v. Lebanon Co.*, 4 Colo. 117, *Post* SIDE LINES.

4. A patent issued for a mining location, while an adverse claim is pending against such application, is void: *Rose v. Richmond Co.*, 2 Colo. Law, Rep. 7 (a *nisi prius* case from Nevada).

5. An adverse claim may be verified by agent in certain cases; and certain affidavits allowed to be made out of the land district: *Amendment of R. S. § 2326. Approved April 26, 1882.*

¹WILSON V. HENRY ET AL.

(35 Wisconsin, 241. Supreme Court, 1874.)

Statute of limitations—Strict construction. Evidence of adverse possession is always to be strictly construed, and every presumption is to be made in favor of the true owner. The party whose title is to be destroyed or remedy barred, may properly stand on the letter of the statute, and insist upon a strict compliance with its conditions.

Tax title defeated by. Between the tax title claimant and the original owner, the latter will be regarded as the true owner, notwithstanding any technical defects which may be found to his title, and he may bar the right asserted by the tax title claimant by showing an actual occupation and use of the premises under his title for any considerable portion of the three years required to perfect a title.

Mining during the mining season. In an action brought by one claiming under a tax deed recorded in 1858, to bar the title of the original owner, defendant offered to show that from 1858 to the commencement of the action during the mining season of each year, from two to ten miners had constantly worked and mined for lead ore upon said land, they being usually farmers, working their farms during the summer and mining during the winter, and working the land under verbal leases from defendants or their agent to whom they paid rent; also, that a custom exists where this land is situate, making it obligatory upon the land owner to hold mineral diggings for the miner operating them during the summer season, though the miner does not work during such summer season; also, that said mining "was mostly near the surface and in open cuts, so as to be plainly visible to all," etc. *Held*, that it was error to reject this evidence, as the facts stated would have shown the action to be barred by the statute.

Appeal from the Circuit Court of Iowa County.

Action for an alleged trespass committed by defendants October 21, 1871, upon land of which plaintiff claimed right of possession, with actual possession and title in fee simple. The answer of the defendant Henry denied plaintiff's title, and charged that one Stephenson was the owner in fee simple and entitled to the possession; that Stephenson had been the owner and in actual possession of the land since 1857, and the parties from whom he derived title had been the owners and in possession since 1847; that Henry had acted as agent for Stephenson for many years in collecting rents from and paying taxes on the land, and as such agent had been in

¹ Same case on second appeal, *post* p. 157.

actual possession since 1856; that the tax deed under which plaintiff claimed title to the land was dated February 3, 1868, and executed to one Moffett, but that Moffett never obtained or attempted to obtain possession of the land under the deed, and that more than three years had expired from the date of the tax deed before the action was commenced; wherefore defendant claimed the benefit of the statute of limitations against such tax deed. Plaintiff replied alleging that the tax deed to Moffett was duly recorded February 3d, 1868, and that Moffett on the 15th of April, 1868, conveyed to plaintiff; that at the date of recording the tax deed the lands were unoccupied and unimproved; that neither Stephenson nor Henry had been in the actual, continued adverse possession of the premises for three years next succeeding the date of the tax deed; and that they had not paid the taxes for each of the three years since said date and had not held the premises adversely to plaintiff.

Upon the trial, plaintiff put in evidence the tax deed to Moffett, and Moffett's deed to himself, and testified that prior to October, 1871, the land in question had never been inclosed nor had it been actually occupied or worked in any manner, except that considerable mining had been done upon it; and that in 1870, he gave written leases to one Holmes and one Hildreth, "giving them permission to dig on the land," and in the winter of 1871-2, one West paid him rent for the use of the land in mining. Defendant put in evidence a patent of the land, from the United States to one Tuttle, and certain mesne conveyances terminating in a deed to one Collier, together with the will of Collier, and a deed of the land from his executors to Stephenson in 1857.

For certain irregularities, these instructions were ruled out as direct evidence of the transmission of the title from Tuttle to Stephenson, but were allowed to be read in connection with any evidence of possession by Stephenson, under claim of title founded upon such instruments, to establish his title by adverse possession. The defendants admitted that the land had never been fenced or cultivated; but they offered to prove that Henry had been the agent of Stephenson since 1858, to look after the land, and that as such agent, he was empowered by Stephenson to enter upon the land; that in 1858, he went upon, surveyed and it, and since that time had gone upon it

at least four times a year until the present time; and that for two or three years after 1858, he sold the grass growing along a stream running through one end of the land. They also offered to show constant possession of the land since 1858 by miners during the mining season of each year, under verbal leases from Henry, as Stephenson's agent. Their offer is set forth more fully in the opinion.

The evidence so offered was excluded as irrelevant and incompetent. Verdict and judgment for plaintiff, and defendants appealed.

HENRY SMITH and P. A. ORTON, for appellants.

ALEXANDER WILSON, respondent *per se*.

DIXON, C. J. The court sees no reason to doubt, qualify, or disturb the rules laid down in *Sydnor v. Palmer*,* 29 Wis. 226, 251-3, for the construction of statutes of limitation, nor to question the correctness of the construction which was given to the statute there under consideration. To determine precisely what was there decided, and the application and effect of the decision in a case like the present, it is necessary that the language of the opinion should be carefully read and observed. The language is: "Evidence of adverse possession is always to be strictly construed, and every presumption is to be made in favor of the true owner." Again it is said: "The party whose title is to be destroyed, or remedy barred, may properly stand on the letter of the statute, and insist upon a strict compliance with its conditions."

It should also be borne in mind that the party seeking to take advantage of the statute in that case, and against whom the rules of strict construction were held, was the claimant under the tax deeds. In the application of the rules, the owner of the land at the time the taxes were assessed, and whose title was to be destroyed or remedy barred by operation of the statute, and of the alleged adverse possession, was regarded as the true owner; and it was in his favor and in support of his title that the strict construction was given. The construction favored the title of the original owner, who

* NOTE.—*Sydnor v. Palmer* is nevertheless completely overthrown as an authority upon the question of adverse possession by mining, both by this opinion and by the judgment in this same case on second appeal. Post p. 157.

was looked upon as the true owner, and disfavored that of the claimant under the tax deeds.

In the present case the defendant Henry, or the party whom he represents, Mr. Stephenson, must be regarded as the true owner, notwithstanding any technical defects or objections which have been found or raised to his title, or to some of the conveyances or transfers which go to form his chain of title. As it respects the plaintiff, whose sole connection with the title or interest in the land is by virtue of the tax deed, and who does not stand before the court to challenge the title of the defendant or to exhibit or take advantage of its defects except as he can show and assert title in himself under the tax deed, the defendant Henry, as the representative of Stephenson, is to be deemed the true owner. Certainly all the equities, if not the strict law, are with the defendant as such owner, for the purpose of applying the rules, as much so, as if he had shown an absolutely unblemished legal title at the time the taxes in question were assessed. It is his original, true and otherwise unquestioned title which is sought to be cut off by virtue of the statute of limitation, and of the adverse possession claimed under it and under the tax deed.

How, then, stands this case with reference to the doctrine of *Sydnor v. Palmer*? The plaintiff seek to cut off the remedy and destroy the right of the true owner, and to show an indefeasible title in himself by virtue of an adverse, constructive possession of the land, for three years next after the recording of his tax deed. Within the rule, the evidence of such adverse constructive possession must be strictly construed and the defendant may avoid the bar and defeat the right asserted by the plaintiff on this ground by showing any actual occupation and use of the premises under his title for any portion of the three years so required to perfect the title of the plaintiff, or to debar the remedy of the defendant. This principle has already been settled by this court in the case of *Lewis v. Disher*, 32 Wis. 504, and it is needless to add to the discussion which will there be found. The court there say: "In order that the claimant by tax deed may assert or acquire title to unoccupied land in that way, or by lapse of time under the statute, it must appear that the land remained and was continuously unoccupied for the whole period during which the statute was running. Any intervention and actual

occupancy during the time by the former owner, or any person for him, disengages the bar of the statute and relieves the former owner from the conclusive effect which would otherwise be given to the tax deed."

But, as will be seen from the same decision and others by this court with which counsel are familiar, the effect of an actual possession taken and held by the former owner during the whole or any considerable portion of the three years, is not only to disengage the bar of the statute when resorted to in favor of the grantee by tax deed, but also to create a bar against him and in favor of the title of such former owner. It operates in favor of the true or former owner thus entering, and holding, to cut off the remedy of the grantee by tax deed, and to annul his title whatever it may have been.

In view of these well settled principles, this court is of opinion that it was error for the court below to reject the offer of proofs made by the defendants, on the trial, and especially that part of the offer in which the defendants proposed to show "that from 1858 to the commencement of this action, during the mining season of each year, from two to ten miners have constantly worked and mined for lead ore upon said land, such miners being usually farmers, working their farms during the summer season, and mining during the winter season, such miners so working upon said land under verbal lease from Henry, acting as Stephenson's agent, they paying rent to Henry; also, that a custom exists where this land is situate, making it obligatory upon the land owner to hold mineral diggings for the miner operating them during the summer season, though the miner does not work during such summer season upon such diggings; also, that the mining for said period upon this land, was mostly near the surface of the ground and in open cuts, so as to be plainly visible to all; also, that occasionally a miner worked upon said land under Stephenson during said time in the summer seasons; also, that Stephenson has paid all the taxes assessed upon said land since it was decded to him by Collier's executors, except the taxes for the non-payment of which the land was sold, and the tax deed to the plaintiff was made; also, that Charles West, Thomas Holmes and Levi Hildreth were tenants of Stephenson, mining upon said land at the time they

became tenants of the plaintiff, as testified by the plaintiff, and that they wrongfully attorned to the plaintiff."

The time included in the foregoing offer, embraced the whole period of the three years from and after the recording of the plaintiff's tax-deed; and the facts, if established, would divest the plaintiff of all constructive possession during the same period. They would not only disprove and destroy his constructive possession, but they would turn the statute of limitation against him by showing the actual possession and occupancy of the former owner, thus cutting off any title acquired under the tax-deed, unless the plaintiff saw fit to bring his action to recover the possession within the three years. The offer, if proved as made, would have shown that the plaintiff was thus under the necessity of bringing his action, and that not having done so, he had lost his title, if any, acquired by the tax-deed, and could not maintain this action, which was not instituted until after the expiration of the three years. It would have sustained the plea or answer of the statute of limitations made by the defendants, so as to protect them and the title under which they claim against the present action and the right now set up by the plaintiff.

The other objections and exceptions contained in the record, and which are quite numerous, have not been considered by the court, and will not now be spoken of. They have been omitted, partly for want of time, and partly because the offer, if established on a subsequent trial, may render it unnecessary ever to consider them.

By the Court.— Judgment reversed, and a venire de novo awarded.

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* WILSON V. HENRY ET AL.

(40 Wisconsin, 594. Supreme Court, 1876.)

Acknowledgment of tax deed. In an acknowledgment to a tax deed, by the clerk, in which acknowledgment, the State and county are named as grantors, the expression contained in its body that it is "the deed, of the State and county," implies an acknowledgment that he executed it for such grantors and is sufficient.

*S. C. ante p. 152.

Statute attempting to define adverse possession. Sections 6 and 7, Chap. 138 R. S. which purport to define what constitutes adverse possession, *held*, not to exclude modes of adverse possession not included in their terms.

Adverse possession by mining. Occupation under paper title by mining operations, continuous, visible and notorious, may constitute actual adverse possession: *Sydnor v. Palmer*, 29 Wis. 226, overruled.

Entry defeating adverse holding. Where one who claims premises *bona fide* under paper title, takes actual possession, his entry defeats the three years' adverse possession which by statute is made to perfect an entry under tax title.

Conflicting possession. There can not be two hostile adverse holdings by possession at the same time.

Possession limited to a lot. By statute, the rule that adverse possession is construed to extend to the bounds of the paper under which the entry was made, is limited to the particular *lot* occupied. And a lot is the smallest legal subdivision of the land, under the land laws of the United States, which in this instance was a 40 acre tract. Lead mining confined to one 40 acre tract of a quarter section will operate only as actual possession of that tract, and will not be extended to the other three quarters of the quarter section.

Misleading instruction. Where an instruction is so worded as to have a tendency to mislead, a judgment rendered on such instruction must be reversed.

Compulsory averment is no estoppel. Where a statute allows ejectment to be brought against parties not in possession, but requires the complaint to aver a withholding by the defendant, such averment is merely formal, and can not be made use of to estop the plaintiff.

Appeal from the Circuit Court of Iowa county.

This action was commenced in October, 1871. The complaint avers, in substance; that plaintiff is owner in fee, entitled to the possession, and in actual possession of a certain described quarter section of land, and that defendants on the 21st day of October, 1871, broke and entered upon the premises, and attempted to take possession thereof, and committed damage thereon to the amount of \$100. It further avers an intention and threats of defendants to take possession of the premises by force. And it prays for a judgment against defendants for \$100, and also for an injunctional order restraining defendants from meddling with plaintiff's occupation of the premises, until the further order of the court.

The separate answer of the defendant, Poquette, denies plaintiff's title, and admits that on the 21st of October, 1871, at the request of the defendant Henry, he took possession of a

dwelling-house on said premises, claims that he is still in possession of said dwelling-house, but denies that he took possession by force, or in any manner injured the plaintiff; and in general denies all averments of the complaint not admitted as above stated.

The separate answer of the defendant Henry, denies that plaintiff is the owner in fee or entitled to the possession of the premises, and avers that one Stephenson is such owner and so entitled; that said Stephenson had been the owner and in actual possession since May 8, 1857; that he and his grantors, and the parties through whom he claimed title, had been the owners in fee simple, and in actual possession since July 24, 1847; that Henry had been for many years Stephenson's agent in collecting rents and paying taxes on said lands, and as such agent had been in actual possession since 1856, of the two hundred acres of land, of which the premises in dispute are a part; and that as such agent, on the 21st of October, 1871, he entered upon the premises and erected a dwelling-house thereon, and leased said lands and dwelling-house to the defendant Poquette, who on the same day entered into possession of said dwelling-house as Stephenson's tenant. The answer further alleges that plaintiff claims title through a tax deed, dated February 3, 1868, executed by the clerk of the board of supervisors of said county to one Moffett; and it pleads the statute of limitations against such deed. The answer denies all averments of the complaint not expressly admitted.

The plaintiff replied, denying the allegations of Henry's answer as to Stephenson's title and possession, and as to Henry's actual possession as Stephenson's agent or otherwise. The reply also set out a complaint filed by Stephenson in said circuit court, in an action commenced by him against Wilson, the present plaintiff, January 12, 1870. This complaint was in ejectment for the premises here in dispute, and alleged Stephenson's title and right of possession, and that Wilson unlawfully withheld the possession; and it asked judgment for a recovery of the possession and for \$500 damages. The reply alleges that Wilson's answer to said complaint admitted his possession of the premises; that said action of ejectment was at issue and pending in said court until October 11, 1871,

when the complaint therein was withdrawn and the action dismissed. The reply also asserts the validity of plaintiff's title under the tax deed to Moffett above described, and insists that Stephenson and those claiming under him, are barred from claiming any interest in the premises adversely to such tax deed.

On the trial, the plaintiff put in evidence the tax deed mentioned in the pleadings, in which the county of Iowa and the State of Wisconsin are named as grantors, and Moffett, as assignee of the county, as grantee. The deed is executed by one Otis, as clerk of the board of supervisors of said county. The certificate of acknowledgment of said deed states that said Otis, clerk, etc., "acknowledges the within and foregoing deed of conveyance to be the free act and deed of said county and State, for the use and purpose therein named." An objection to the deed as evidence, on this ground, was overruled. Plaintiff then put in evidence a quit-claim deed of the premises to him from Moffett, dated April 15, 1868, and recorded November 13, 1869. It was admitted that Henry, on the 21st of October, 1871, entered on the land, built a small house thereon, claiming a right to do so under Stephenson, and did damage to the amount of one dollar. Plaintiff then testified that the land was suitable mainly for agricultural purposes, and that a little mining had been done on four or five acres of the southern portion of it; and that from the date of the tax deed until October, 1871, the land was unimproved, uncultivated and unoccupied; and that on the day last mentioned, he set men at work upon it digging post holes for a fence. The plaintiff also put in evidence the record of the action in ejectment brought against him by Stephenson in 1870. This record tended to prove the averments in relation thereto recited in the above statement of the reply herein.

Defendants offered to prove that on the 7th of October, 1873 (the day of the first trial of this action), Stephenson had deposited with the proper officer, for the purpose of redeeming the land in dispute, the sum necessary for that purpose; but the evidence was rejected. The defense then put in evidence, 1. A patent of the premises issued September 3, 1847, to one Tuttle pursuant to a previous location by Tuttle of a military land-warrant, under an act of Congress of July 27,

1842. 2. Certain secondary proof of the execution by Tuttle, on the 24th of June, 1846, of a power of attorney to one Lyon and one Henn, purporting to authorize them to locate said land-warrant and to convey the land; together with evidence of the loss of such power of attorney. 3. A warranty deed of the premises, executed September 1, 1847, to one Bequette, by Henn as attorney for Tuttle. Although this deed, executed before the patent to Tuttle, was insufficient to pass the title (*Stephenson v. Wilson* and another, 37 Wis. 482), it was admitted in evidence as the basis of a claim of title by possession. 4. Mesne conveyances, by which the rights of Bequette under said deed passed to Stephenson, May 8, 1857. 5. A deed of the premises from Tuttle to one Foster, dated April 4, 1848, and a like deed from Foster to one Nichols, dated October 20, 1849. (A like deed from Nichols to Stephenson, dated July 13, 1872, was offered, but ruled out.) 7. Testimony tending to show that Henry had been agent for Stephenson in respect to the premises, since July 23, 1857, on which day he had it surveyed, and on which day, also, there were eight men mining on the land, who attorned to Stephenson; that from that time until the commencement of this action, there had been every winter, a number of miners at work on the land by permission of Henry and his sub-agents, paying rent when mineral was obtained, their number varying from time to time, from four to eight; that during the summers, there were miners at work occasionally, though not at all times, the miners being generally engaged in farm labor elsewhere during that season; that a custom existed in that region, which was recognized by Henry and his sub-agents, that a miner who worked the land in winter, did not forfeit his right thereto by not working during the summer; that the windlasses and tools of the miner were at all times on the ground, ready for use; that there was a hay bottom of five or six acres near the north end of the land, which was leased by Henry, and the crop of hay thereon cut and removed from 1857 to 1869 or 1870; and that Stephenson had paid the taxes upon the land for each year after 1857.

As to the three years immediately succeeding the recording of plaintiff's tax deed, defendant's evidence tended to show that mining was done upon a portion of the land, under Steph-

enson, every year in the manner above described. As to the portions of the quarter section on which such mining had been done, by persons attorning to Stephenson, the evidence for defendants was not very clear or definite; but seems to have related chiefly, if not wholly, to a portion of the quarter section near its southern end. The evidence as to a custom by which miners did not forfeit their claims by failing to work them in the summer, was received against plaintiff's objection. Plaintiff also introduced evidence in rebuttal to disprove the alleged custom and to show that there had never been any continuous mining by persons attorning to Stephenson, on any part of the premises for any three consecutive years; that the only diggings of any importance were on a limited tract at the south end of the premises; and that plaintiff had been in actual and undisputed possession of the whole or a portion of the premises during the whole or a portion of the three years immediately subsequent to the recording of his tax deed.

The court instructed the jury, in substance, that no record title had been shown in Stephenson; that if he or those under whom he claimed had gone into actual possession of the land, and continued in such possession for ten successive years, such possession being exclusive, open and so notorious that all persons having an interest in or claim upon the land must be presumed to have known it, and its adverse character, and such occupancy being for the purpose of mining or other ordinary use to which land may be applied by the ordinary industry of the country, then Stephenson's defective paper title under Bequette would be perfected by such adverse possession; that the tax deed to Moffett was sufficient to extinguish any pre-existing title; but that, whether Stephenson's title had or had not been perfected by adverse possession at the time when the tax-deed was recorded, "if Stephenson or his agent or tenant openly occupied the land and mined thereon for the purpose of obtaining lead ore, for any part of the three years next after the recording of the tax-deed, this would bar the title under such deed," and the verdict must be for the defendants; but that, "if the land was vacant and unoccupied by any person under the authority, or permission, or consent of Stephenson or his agent, for three years next after

the recording of the tax deed," the verdict should be for the plaintiff.

The jury found for the defendants; a new trial was denied; and plaintiff appealed from a judgment on the verdict.

Alexander Wilson the appellant, in person, argued that in this State a tax deed vests in the grantee an absolute estate in fee simple in the land (R. S., Ch. 18 Sec. 127), and carries with it constructive possession of the land, so far as unoccupied (*Lewis v. Disher*, 32 Wis. 507; *Lawrence v. Kenney*, Id. 281); and the grantee can maintain trespass thereon, as well as upon any other deed (*Harding v. Tibbils*, 15 Wis. 232). 2. That as the land here in dispute had never been cultivated or improved or inclosed, and was not part of a "known farm," adverse possession thereof to grow into a title, must be continuous for the period prescribed by Sec. 6, Ch. 134, R. S., and must be such as to bring it within Subd. 3, Sec. 7 of that chapter; *i. e.*, it must have been "used for the supply of fuel, or of fencing for the purpose of husbandry, or the ordinary use of the occupant." This court has recently declared, in *Pepper v. O'Dowd*, 39 Wis. 538, that "land, to come within this subdivision, must be used for the supply of fuel or fencing, according to the subdivision, and, we are inclined to think, must be for that use as its sole or principal object, in good faith." In support of the same construction, see *Sydnor v. Palmer*, 29 Wis. 226; *Dupont v. Davis*, 35 Id. 631; *Munro v. Merchant*, 26 Barb. 383. (Counsel criticised the opinions in *Wilson v. Henry*, 35 Wis. 241, and *Stephenson v. Wilson*, 37 Id. 494, as inconsistent with those just cited.) The bog iron ores in the northwestern part of this State, are on the surface of the land. In several places in the southwestern part of the State, the lead ore "float" comes up to the grass roots. These lands are also good agricultural lands. Will mining for such surface ores be evidence of adverse possession? Does it amount to more than the cutting of grass, or occasional cutting and hauling of timber? Where will the line be drawn between surface, shallow and deep mining? There is no husbandry about it, no improvement of the soil. Other States construe adverse possession, as this court has latterly construed it, notwithstanding their mining lands: *Munro v. Merchant*, 26 Barb. 383; *People v. Livingston*, 8 Id.

255; *Wood v. McGuire*, 15 Ga. 202; *Wheeler v. Winn*, 53 Pa. St. 122; *Young v. Herdic*, 55 Id. 172. 3. That adverse possession to bar title under a tax deed, must be of the same kind as that which bars the original title: Laws of 1859, Ch. 22, Sec. 34. 4. That if Stephenson had neither the record title, nor title by possession before the recording of the tax deed, occupancy under him after the recording of that deed, would not operate to bar the plaintiff's title. It is only the owner whose title is extinguished by the tax deed, who can, by occupancy during the three years immediately subsequent to the recording of that deed, bar the title under it: *Gunnison v. Hoehne*, 18 Wis. 269; *Knox v. Cleveland*, 13 Id. 250; *McMahon v. McGraw*, 26 Id. 621; *Parish v. Eager*, 15 Id. 590; *Wheeler v. Winn*, 53 Pa. St. 122; 33 Id. 462; 6 Id. 210. 5. That where two persons are upon land, each claiming title and right of possession, and each doing acts in assertion of such right, the one who has the title is to be considered as in actual possession, and the other person as a trespasser: *Jones v. Chapman*, 2 Exch. 821; 1 Hilliard on Torts (3 Ed.), 505.

For the respondent a brief was filed, signed by Henry & Smith and P. A. Orton, and there was oral argument by J. M. Smith. It was contended on that side, 1. That the tax deed to Moffett never vested title in him. (1) It was not duly acknowledged, since the statute requires that "the person executing the deed (in this case the clerk), shall acknowledge the execution thereof," *i. e.*, its execution by himself: *Hayden v. Wescott*, 11 Conn. 131; *Bryan v. Ramirez*, 8 Cal. 461; *Henderson v. Grewell*, Id. 581; *Short v. Conlee*, 28 Ill. 219; *Smith v. Garden*, 28 Wis. 686. (2) A tax-deed not duly acknowledged, is not even *prima facie* evidence of title: Laws of 1859, Ch. 22, Sec. 25; *Wood v. Meyer*, 36 Wis. 308. (3) If not properly acknowledged, the deed is not validly recorded, and the right of redemption still exists; and proof of such redemption was offered at the trial. 2. That any occupation of the land by Stephenson, claiming in good faith under his deed, during the three years next after the recording of the tax deed, would bar the tax title: Tay. Stats. 440, § 172; *Wilson v. Henry*, 35 Wis. 241. This is *res adjudicata* in this case: *Wright v. Sperry*, 25 Wis. 617. 3. That the

possession by the former owner, which will bar the title under a tax deed, if action thereon be not brought within three years, is quite different from the adverse possession for ten or twenty years defined in the general statute of limitations. In the former case, the original owner has only to show that the premises at some time during the whole three years were not unoccupied. Slight occupancy, with every presumption in favor of the former owner, would support this conclusion; and the possession of Stephenson's mining tenants, at any time during the the three years, was sufficient: *Jones v. Collins*, 16 Wis. 594; *Wilson v. Henry*, 35 Id. 241; *Lewis v. Disher*, 32 Id. 504; *Stephenson v. Wilson*, 37 Id. 482. 6. That the complaint in the ejectment suit by Stephenson against Wilson, does not estop Stephenson from denying that Wilson was then in possession, that action having been dismissed by Stephenson, and the complaint being in the form required by the statute, even where the land is wholly unoccupied: *Barclay v. Yeomans*, 27 Wis. 683; *Platto v. Jante*, 35 Id. 630.

RYAN, C. J. The respondent's criticism on the acknowledgment of the tax deed under which the appellant claims, is ingenious, but too nice to support the objection to the deed: *Winans v. Ins. Co.* 38 Wis. 342; *Dousman v. Mining Co.* 40 Wis. 418.

Sec. 50, Ch. 22 of 1859, requires the clerk to execute the deed in the name of the State and the county, as grantors, and it is essential to the validity of the deed, that they purport to be the grantors in it: *Woodman v. Clapp*, 21 Wis. 355. Sec. 25 requires the clerk to acknowledge the deed. The clerk acknowledged this deed to be the deed of the State and county. Perhaps it would have been more proper for him to have acknowledged his execution of the deed for the State and county. But the distinction is very nice. In either form, it is very certain that the clerk who executes the deed, in acknowledging it, implies an acknowledgment of his own execution of it. And as he is the officer authorized by law to execute the deed in the name of the grantors, his own acknowledgment might be sufficient. The certificate here shows that he acknowledged the deed for the grantors, and that appears to us a sufficient compliance with the statute: Ch. 86, Sec. 8, R. S. A substantial compliance is sufficient: *My-*

rick v. McMillan, 13 Wis. 188; *Wilson v. Hunter*, 14 Id. 683; *Smith v. Garden*, 28 Id. 685.

The learned appellant appeared to assume that there is a conflict in the cases in this court, on the subject of actual adverse possession. We think this is a mistake. It appears to rest upon the idea that Secs. 6 and 7, Ch. 138, R. S., assume to exhaust the conditions of actual adverse possession under paper title. Such a view would be an entire misapprehension of the scope and tenor of those sections, and of the construction given to them by this court.

Sec. 6 limits the extent of constructive adverse possession under paper title, arising from actual adverse possession of part only of the premises included in the paper title. But like Sec. 8, it gives the effect of actual adverse possession, without attempting to define what shall or shall not constitute such possession. Sec. 7, however, "proceeds to define some conditions of adverse possession under Sec. 6:" *Pepper v. O'Dowd*, 39 Wis. 538. The object of Sec. 7 is obviously to establish certain rules of actual adverse possession, which the legislature considered just and necessary in view of the habits of the people. But the section does not undertake the dangerous task of codifying all conditions and qualities of actual adverse possession. This is manifest in the language of the section. "For the purpose of constituting an adverse possession, land shall be deemed to have been possessed and occupied in the following cases." Here is no restrictive phrase; no sign of a restrictive intent. No one of the conditions given, goes upon a *pedis possessio*; perhaps more properly written, *pedis positio*; *possessio est quasi pedis positio*; a rule "ill suited to a country in which a large proportion of every man's land is uninclosed:" GIBSON, C. J., in *Waggoner v. Hastings*, 5 Pa. St. 300. The conditions given in the section, are probably all conditions which would fail to uphold an adverse possession at common law: *Jackson v. Schoonmaker*, 2 Johns. 230; *Bailey v. Irby*, 2 Nott & McC., 343. Noticeably, not one of the conditions goes upon perhaps the most perfect quality of actual possession, actual residence. For one may well enter under paper title and reside upon land, not cultivated or improved, inclosed, or used for fuel or fencing, within the meaning of the section; some or all of

these conditions perhaps follow later. So one might occupy land, uncultivated, unimproved, uninclosed, unused for fencing or fuel, for a lumber or coal or wood yard, or for storing other heavy goods, or for the manufacture of staves or other wooden ware from growing timber, so as to constitute a continuous, visible and notorious adverse possession. None of these cases, or others which can be supposed, appear to come within the terms of the section. Yet there is nothing in the section to exclude them. And it is inconceivable that the legislature could have intended to exclude them. Giving the character of actual possession to conditions which might otherwise uphold constructive possession only, it can not be supposed that the section was intended to exclude cases of absolute possession, unaccompanied by such conditions. Manifestly the design of the section was to supply certain conditions of actual adverse possession, not to exclude others. This is the plain import of the language used, and the construction given to the section in *Pepper v. O'Dowd*, not questioned in any other case in this court which we are able to recall. Sec. 6 is therefore held to limit and define the extent of constructive adverse possession, arising from actual adverse possession under paper title, in all cases, whatever may be the nature of such actual possession; and Sec. 7 is held to define given conditions, but not to limit the conditions of actual adverse possession. Whatever would constitute actual adverse possession under paper title, outside of the statute, still constitutes it, notwithstanding the statutory definition of other conditions of such possession.

It is true that in *Sydnor v. Palmer*, 29 Wis. 226, the chief justice, upon a casual reading of his opinion, would seem to refer all actual adverse possession to Sec. 7; but a careful consideration of the opinion will show that he did not fall into that error. That was a case of actual adverse possession claimed by force of mining operations. The court below had read Secs. 6 and 7 as a part of the charge, and instructed the jury that the possession claimed, came within Sec. 7. The opinion simply, and beyond doubt correctly, holds that this was error, summing up the discussion in these words: "It seems clear, therefore, that all the provisions of the statute relate, and are intended to apply only, to the use and occupation of land for

the purposes of husbandry; and that its use or occupation for the purpose of digging mineral, or other works and operations beneath the surface, and not connected with agriculture or the ordinary use and cultivation of the soil, is not included. But it may be said that these observations are unnecessary; and so in strictness they seem to be, since, notwithstanding the instruction the jury found, there had been no adverse possession for the period of ten years before the commencement of the action." Whether or not material in that case, the view of the statute thus taken is undoubtedly correct, so far as it goes; but we find no word in the opinion going to hold that the provisions of Sec. 7 are exclusive of all other actual adverse possession.

And this construction of the opinion in that case, and of the statute, is tacitly recognized by the same learned judge in *Wilson v. Henry*, 35 Wis. 241. For it is held in that case that possession under color of title, by mining operations, would be sufficient to disengage the bar of the statute of limitations in favor of the grantee by tax deed, and to create a bar against him. And so it is correctly said by COLE, J., in *Stephenson v. Wilson*, 37 Wis. 482: "The doctrine of the case of *Sydnor v. Palmer* was not supposed to be in conflict with that of *Wilson v. Henry* by the Chief Justice, who wrote both opinions, nor did the other members of the court understand that it was."

So, in the latter case, *Stephenson v. Wilson*, some language in the opinion might possibly bear the construction of referring all actual adverse possession to Sec. 7. But it is used only in comment upon the construction given at the bar to *Sydnor v. Palmer*. It is said that the remark of the Chief Justice in *Sydnor v. Palmer*, already noticed, was unnecessary, and so stated to be at the time, and added: "Still the defendant relies upon it more or less to sustain the construction of the statute for which he contends. In the broad sense in which the language is used, or is attempted to be applied, we think the remark needs qualification."

There is nothing here at all in conflict with the construction of the statute adopted in *Pepper v. O'Dowd*, and in this case. And indeed, that construction is implied in *Stephenson v. Wilson*, as well as in *Wilson v. Henry*, by upholding actual

adverse possession by mining operations, which are clearly within none of the four subdivisions of Sec. 7.

Whatever doubt, therefore, might be implied from the language used in *Sydnor v. Palmer*, it is settled in *Wilson v. Henry*, and *Stephenson v. Wilson*, that occupation under paper title by mining operations, continuous, visible and notorious, may constitute actual adverse possession. And we have no doubt of the correctness of the rule. Sec. 7 was undoubtedly framed mainly in view of agricultural occupation; and in the circumstances of the State, was undoubtedly wise and just. But, though mining is a less general and important, it is still a frequent and important industry here, entitled to protection as well as agriculture. It is not protected by the statute, as agriculture is; but there is no reason why it should be proscribed by the statute, and we have seen that it certainly is not. While the law remains as it is, it is not an open question in this court, that mining operations may constitute actual adverse possession. In the present case it is *res adjudicata*; for *Wilson v. Henry* was another appeal in this cause; and it was there held that the very mining operations set up by the respondent here, if proved to be continuous, visible and notorious, would constitute actual adverse possession, sufficient "not only to disengage the bar of the statute when resorted to in favor of the grantee by tax deed (the present appellant), but also to create a bar against him, and in favor of the title of such former owner" (the present respondent's principal, in whose right he defends.)

We can not think it material in this case, that in *Stephenson v. Wilson* we held the legal title of the respondent to be defective because the patentee's deed, under which the respondent claimed by mesne conveyances, was void under an act of Congress. Neither can we follow what was somewhat loosely said in *Wilson v. Henry*, to the effect that the respondent's principal, Stephenson, must be held as the true owner, notwithstanding technical defects in his title; and that the appellant, claiming under a tax deed, could not take advantage of such defects in Stephenson's title. This view was unnecessary to the decision of that appeal, and appears to disregard the rule that a plaintiff, seeking to recover on his legal title, must recover on the strength of his own and not on the weak-

ness of his adversary's. But a perfect legal title was unnecessary to Stephenson or his representative in that appeal, as it is in this. Certain it is, that if Stephenson took any possession, he took it "under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question," within Sec. 6. Such an entry as is held in *Wilson v. Henry*, would operate to begin an actual adverse possession, to cure all defects of his title in ten years, and would therefore break the bar of the statute in favor of the tax title. For it would be too absurd to suggest that there could be a constructive adverse possession of the same premises in one, and an actual adverse possession in another, each running to bar the other in statutory time; or that there could be actual adverse possession of the same premises, in different claimants, under different titles, each running at the same time to bar the other. If the respondent's principal, Stephenson, could take actual adverse possession to bar anyone, he could to bar the appellant.

Stephenson appears to claim the premises, *bona fide* under a paper title, which he took, believing it to be good. His possession is very distinguishable, under the statute, from a mere trespass, as in *Gunnison v. Hæhne*, 18 Wis. 268.

If Stephenson took actual adverse possession, under his paper title, so as to interrupt the three years' possession of the appellant under Sec. 32, ch. 22 of 1859, he would presumably have defeated the appellant's title to the extent of such actual possession, and of the constructive possession following upon it under Sec. 6, ch. 138.

This brings us back to the latter section. Our views of the object of this section are fully explained in *Pepper v. O'Dowd*, and need not be repeated here. We then gave and now affirm this construction of the scope and effect of its provisions: "Sec. 6 enacts, what was generally recognized as the law before the statute, that when one enters into and holds continual possession under a paper title of part of the premises included in it, he shall be deemed to hold adversely all the premises included in it; that is, when one enters under color of title, he is presumed to enter, claiming according to the extent of his title: *Sydnor v. Palmer*, 29 Wis. 226; and

where there is no adverse possession, the law will construe his entry to be coextensive with his title: *Ellicott v. Pearl*, 10 Pet. 412; except that when the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed the possession of any other lot of the same tract. This exception materially restricts the rule of constructive adverse possession, as held before the statute, and unquestionably enters into every condition of adverse possession under these sections, save only in the instance of a known farm, substituted by subd. 4 of Sec. 7, for a single lot. And so, under these sections, actual adverse possession of part of a single lot or a known farm, shall not operate as constructive adverse possession beyond the limits of such lot or farm."

"There is no difficulty in determining what a single lot of the statute is. It is the smallest legal subdivision of land: *Munroe v. Merchant, supra.*" And the rule of Sec. 6 undoubtedly applies to all actual adverse possession under paper title, whether within or without Sec. 7.

When land has not been further subdivided by the owner under patent from the United States, the lot of Sec. 6 is undoubtedly the smallest subdivision of land under the land laws of the United States. At the time when the land in controversy was entered, and thence hitherto, this appears to have been generally a quarter-quarter section of land, forty acres. See act of Congress of April 5th, 1832, 4 U. S. Stat. at large, 503; Act of Congress of May 8th, 1846, 9 U. S. Stat. at large, 9; Circular of the Commissioner of the General Land Office of May 14th, 1846, 1 Lester's Land Laws, 376.

And so any actual adverse possession of Stephenson, the respondent's principal, would not operate as constructive adverse possession beyond the limits of the forty-acre lot on which the actual possession was held. And, being so limited, it could not within the rule in *Wilson v. Henry* and *Stephenson v. Wilson*, affirmed in this opinion, operate to oust any actual or constructive possession of the appellant, or to disengage the bar of the statute in his favor, or to create a bar against the appellant and in favor of the respondent's principal, outside of the forty-acre lot of which the actual adverse possession was held: *Pepper v. O'Dowd, supra.*

It is unnecessary to recapitulate the evidence bearing on the actual possession claimed by the respondent for his principal. It is sufficient to say that it does not appear to have covered each of the quarters of the quarter section in controversy.

In view of the evidence, and as applicable to it we can not but hold that the charge of the court below overlooked the provision of Sec. 6, limiting the constructive effect of actual possession to a single lot, or else applied it to the whole quarter section: "a tract divided into lots." Whichever the mistake was, it is equally fatal to the judgment. It is true, that the charge speaks throughout of Stephenson's occupying and mining the land, without any distinction between the whole or a part, but the fair construction of the charge, in the light of the evidence is, that occupation and mining on any part of the quarter section would equally affect the appellant's claim of title to the whole. A jury having heard the evidence, would presumably give it that construction; we think that a lawyer would. Be that as it may, when an instruction is so worded that, as applied to the evidence in this case, it has a tendency to mislead the jury as to the rule of law, judgment on a verdict following the instruction must be reversed: *Hutchinson v. Railway Co.*, 37 Wis. 582, and cases there cited. The rule, as held in *Pepper v. O'Dowd*, should have been fully and distinctly given to the jury.

The record of the ejectment suit of *Stephenson v. Wilson*, was apparently competent evidence bearing on the question of possession, *valeat quantum*; but it was certainly not conclusive. The statute authorizes an action of ejectment, in certain cases, against persons not in actual possession, but requires the complaint to aver that the defendant withholds the possession: *Platto v. Jante*, 35 Wis. 629, and cases there cited. The averment of possession, in such a case, is therefore not only formal, but untrue in fact; yet made imperative by an apparent oversight in the statute: *Barclay v. Yeomans*, 27 Wis. 682. And it would be unreasonable and unjust to hold it an estoppel.

We have been reluctant to disturb a second judgment in this cause; but our views of the law governing it leave us no choice.

BY THE COURT.—*The judgment is reversed, and the cause remanded to the court below for a new trial.*

RICH, DEM. CULLEN V. JOHNSON.*

(2 Strange, 1142. At nisi prius, 14 Geo. II.)

Surface possession. In ejectment for mines the plaintiff proved himself lord of the manor, and that he was in possession thereof. But the same witness proving that the defendants had had possession of the mines above 20 years, the court upon a trial at bar held this no evidence to avoid the statute of limitations, there being no entry within 20 years upon the mines, which are a distinct possession, and may be different inheritances, and therefore directed the jury to find for the defendants.

HODGKINSON V. FLETCHER ET AL.

(3 Doug. 31. King's Bench, 1781.)

Surface possession after severance. In the 10th year of James I, the coal under the fee farm lands of Ripley was granted to a party from whom defendant traced title. Plaintiff owned a fee farm in Ripley, and sued defendant for taking coal. Neither plaintiff nor defendant had ever taken coal from this certain fee farm, until the present alleged trespass, but defendant had worked under other farms in Ripley. *Held*, that the possession of the surface by the plaintiff was not inconsistent with defendant's claim to the coal, and that verdict for defendant was justified.

Trespass for breaking and entering the plaintiff's closes and digging coals. Plea, that those closes, 10 Jac. I, were part of the fee farm of the Crown; that one B was seized of all the mines under the fee farm lands of the crown in Ripley, who granted them to A B, and so deduces a title to one Hunter, under whom defendants claim, and justify digging for coal, etc. Replication, that no right of entry accrued to Hunter, or those under whom the defendants claim, within twenty years before the trespass committed.

Rejoinder, that a right did accrue within twenty years before the trespass committed.

On the trial at Derby, before GOULD J., the evidence was, that the defendants, or those under whom they claim, had

* Sometimes cited as *Cullen v. Rich*. Although the report is brief, it is clear, and is regarded as a leading case.

regularly, from the time of the grant to this time, dug for coals under other of the fee farm lands in *Ripley*; in some quietly, in others with a contest, in which they succeeded; but no positive evidence was given of their having ever worked under the fee farm lands of the plaintiff till the time when, etc.; but it happened that neither the plaintiff nor his predecessors had ever dug under the lands. A verdict was found for the defendants, and a rule having been obtained to show cause why there should not be a new trial, the court called upon the counsel for the plaintiff to support the rule.

Hill, Serjeant, Wilson and Wood, in support of the rule. The question is, whether the defendants' right to dig in the plaintiff's land is not barred by their not having exercised it for twenty years. The proof of the issue lay upon the defendants, being in the affirmative, and they did not prove any exercise of the right within that period. A right to enter for the purpose of digging for coals or minerals is as much subject to the operation of the statutes of limitation, as a right to enter upon the soil: *Rich, dem. Lord Cullen v. Johnson*.* It is necessary, in order to keep up such a right, to do some act, as of working the mine once in twenty years. Suppose that Hunter had been the lessor of the plaintiff in ejectment, or demandant in a real action for these mines; he must have shown a right of entry within twenty years, or a seizin within the proper period of limitation; so, to support this plea a possessory title must be established. It does not resemble the case where the owner of the soil is likewise the owner of the mines under the soil: *Lead Company v. Richardson*.

The answer attempted to be given will be, that the defendants have exercised the right in other parts of the fee farm lands; but the digging in the lands of other persons can be no evidence against the plaintiff. *Prima facie*, the owner of the land is owner of the mines also, which pass by a grant of the land: *Co. Litt.* 4.

To rebut this presumption stronger evidence is required than was given in this case. If that evidence be sufficient, a man would have nothing to do but have large words inserted in his grant, and then to dig in parts where he had a right;

* Ante p. 173.

this would then be evidence against other owners, and evidence which they could never repel. There is also another objection. The plea, in setting out the grant, makes use of the words, "mines, delfs and pits of coal," which extend only to such mines as are open, and give no liberty of opening fresh mines: *Astry v. Ballard*. In such grants, in order to authorize the opening of fresh mines, the word "digging" is usually inserted. [Per Cur. In *Astry v. Ballard*, were not the mines open? They were. Per. Cur. That, then, is a different case; for here the defendants are entitled to the mines, whether opened or unopened.]

Lord Mansfield (without hearing the other side): It appeared that in 10 Jac. 1, there was a grant of the right of mines under the feefarm lands in *Ripley*. The plaintiff's lands are part of those feefarm lands, and he pays a proportion of a feefarm rent. The defendants claim as coalmasters under the original grantee. The plaintiff has put the whole question upon this issue, that whatever may have been the original right, it is now barred by the statute of limitations. I agree with the counsel for the plaintiff, that if the defendants would be barred in an ejectment, they would be barred on this issue upon these pleadings.

It was proved that the defendants have regularly, from the time of the grant up to this time, dug under the other feefarm lands in *Ripley*, in some quietly, in others with a contest, in which they succeeded; but no positive evidence is given that they worked under the plaintiff's lands till the cause of action. It appears also, that the plaintiff, or his predecessors, had never dug under his lands. These were all the facts proved. Independently of the law of limitations, there arises a presumption of right in favor of possession, where that possession is adverse to the right claimed. Even in the case of the Crown there is such a presumption in favor of possession. But to support an argument of this nature, the possession must be notoriously adverse to the claim set up; it must not be a possession consistent with the claim. Thus, the possession of a lessee, of a joint tenant, or of a tenant in common, shall not bar, because it is consistent with the claimant's title; so a fine levied by a tenant for life does not begin to run till the particular estate has

expired. Here, the grantees have never abandoned their right, but, on the contrary, have been continually exercising it. They are not bound to be constantly working in every place. It is the nature of the right, to be exercised by degrees, and to go on for ages. The grantees must be governed in the exercise of the right by the circumstances which occur, by the course of the veins, etc. It is a material fact, that neither the plaintiff nor his predecessors have ever exercised the right themselves. Had the mines been worked by them, the case would have been different. But his possession of the land is not a possession adverse to, or inconsistent with, the claim of the defendants, who have had a notorious possession, under the lease, by working the other pits.

Willes and *Ashurst*, *justices*, of the same opinion. *Buller*, *justice*. The rule as to adverse possession, laid down by my lord, may be found in the case of *Reading v. Royston*. The *prima facie* evidence of title to the mines, which the possession of the land affords, is in this case rebutted by the grant. Since the grant, the mines have never gone with the land. Even, if none of the pits in *Ripley* had been worked for upwards of twenty years, I do not think that the defendants would have been barred; for, in order to bar them, there must be an adverse possession in some one else, of which no evidence was given. [The *Attorney-general* said that in *Northumberland* it was usual for the coal masters to buy up old grants, which had never been used for 100 years, for the sole purpose of preventing their being worked, which had always been the object of the successive proprietors.]

Rule discharged.

ARNOLD ET AL. V. STEVENS.

(24 Pick. 106. Supreme Court of Massachusetts, 1839.)

After severance, surface user is not adverse. Where the right to dig ore is granted, but not exercised during forty years, such neglect in the absence of adverse enjoyment will not extinguish the right; and the occupation and cultivation of the soil above, during such period, is no evidence of adverse enjoyment as to the minerals.

This was trespass for breaking and entering the plaintiffs' close, and digging and carrying away iron ore, etc., between the eighth of May, 1837, and the 1st of June, 1838. The trial was before PUTNAM, J.

The plaintiff deduced his title as follows: On the 23d of December, 1766, Micah Mudge conveyed the *locus in quo* to Alexander Gaston, senior, by a deed containing the following clause: "excepting the whole privilege of building a corn-mill or mills on the stream said land contains, and all the iron ore therein contained, together with the privilege of digging and carrying off in some convenient place." A. Gaston, senior, devised the *locus* to his son, Alexander Gaston, junior, "reserving only, all the iron ore on said bequeathed land, with the privilege of digging and carrying off in some convenient place." A. Gaston, junior, upon the death of his father, entered into possession of the *locus*; and after his death his title thereto vested in Heman Gaston, one of his heirs, who conveyed the *locus* to the plaintiffs, without making any exception or reservation.

The defendant proved, that on the 7th of June, 1763, Mudge, by deed, conveyed to Samuel Brown, among other things, a certain part of "the mines, minerals, or precious stones, found or hereafter to be found" on the land, "with the liberties to cut wood, raise stone, dig, search and improve to the best advantage, and export at convenient ways and passages anywise across the said land; also, to build iron works, forge or furnace, on any of the streams in said land, and passing and re-passing from said iron works or furnace when built, with any carriage or carriages, all his part of said ores, or the produce of the same, or of anything necessary to manufacturing said ore, without let or molestation of or from said Micah Mudge, his heirs or assigns." Upon the death of Samuel Brown, his title under such deed vested, by force of a residuary clause in his will, in his son, Elisha Brown, who in 1836 leased to the defendant a right to enter upon the premises, and dig and remove ore.

It appeared, that after the entry of A. Gaston, junior, upon the premises, which took place in 1783, he and his heirs continued in the open, exclusive and uninterrupted possession thereof until after the execution of the lease from E. Brown

to the defendant; that the premises were cultivated and in meadow; and that more than forty years previous to the execution of such lease, a pit was made on the premises and some ore dug; but that the pit was afterward filled up.

There was no evidence that any claim was made to the ore or to any other rights conveyed to Samuel Brown by Mudge, or excepted in the deed from Mudge to A. Gaston, Senior, either by Mudge or any one claiming under him, for a period of more than forty years, nor that A. Gaston, Senior, or his son, claimed such ore, unless the facts before stated constituted such claim; nor was there any evidence that E. Brown, for a period of forty years after the will of S. Brown was proved, made any claim to the ore, he being, for a considerable part of that time insolvent.

The jury returned a verdict for the plaintiffs.

If the court should be of opinion that the jury were authorized by law to find such a verdict, it was to stand; otherwise it was to be set aside, and a new trial granted.

BISHOP AND BRIGGS, for the defendant, cited *Goodtitle v. Chandos*, 2 Burr. 1065; *Eldridge v. Knott*, 1 Cowp. 214; *Jackson v. Welden*, 3 Johns. R. 283; *Keene v. Deardon*, 8 East, 263; *Doe v. Butler*, 3 Wendell, 149; *Daniel v. North*, 11 East, 372; *Brandt v. Ogden*, 1 Johns. R. 156; *Jackson v. Schoonmaker*, 2 Johns. R. 230; *Schauber v. Jackson*, 2 Wendell, 13.

BYINGTON AND TUCKER, for the plaintiffs, cited *Hoffman v. Savage*, 15 Mass. R. 130; *Jackson v. Joy*, 9 Johns. R. 102; *Doe v. Prosser*, Cowp. 217; *Jackson v. M'Call*, 10 Johns. R. 377; *Hepburn v. Auld*, 5 Cranch, 262; *Jenkins v. Hopkins*, 9 Pick. 543; 2 Saund. 175, note; 3 Kent's Comm. 355; *Bealey v. Shaw*, 6 East, 214; *Ingraham v. Hutchinson*, 2 Connect. R. 584; *Atkins v. Bordman*, 20 Pick. 302.

MORTON, J., delivered the opinion of the court.

The defendant admits the acts complained of as a trespass, but justifies them under a claim of right. He alleges that those under whom he acted were the rightful owners of iron ore on the *locus in quo*, with the privilege of digging and removing the same.

The plaintiff's title to the fee of the land is undisputed.

The burden, therefore, to show that the estate is subject to a servitude, and that he is entitled to the special interest in it which he claims, rests upon the defendant. Formerly, the whole estate was in Micah Mudge. From him the plaintiffs regularly derive their title to the fee; and under him the defendant claims the right upon which he rests his defense.

In 1763, Mudge conveyed to Samnel Brown, among other things, a certain part of "the mines, minerals or precious stones" "found or hereafter to be found" on the land, with liberty "to dig, search and improve to the best advantage;" to build iron works on any of the streams on the land, and to export with "carriages all his part of said ores or the produce of the same."

This grant undoubtedly vested in Brown a particular estate or easement. That such a right, interest or privilege in real estate may be conveyed by deed without conveying the estate itself, is unquestionable: Co. Lit. 4 b; *Rehoboth v. Hunt*, 1 Pick. 224. Whatever estate vested in S. Brown, passed by his will to E. Brown, whose lessee the defendant is. The title thus traced extends to a portion only of the easement. But it is immaterial to the present action, whether the defendant can show a title to the other portions or not, for if he is a tenant in common with the plaintiffs or any other persons, he is not liable to this action.

In recurring to the plaintiffs' title, there will be found to be a perfect coincidence between the titles of the two parties. All the deeds under which the plaintiffs claim, carefully exclude them from all right to the ore, etc. Mudge, in his conveyance of the *locus in quo* to A. Gaston, in 1766, expressly excepts from his grant, among other things, "all the iron ore therein contained, together with the privilege of digging and carrying off in some convenient place." And A. Gaston, in his devise to his son, A. Gaston, Junior, has the following words: "reserving only, all the iron ore on said bequeathed land, with the privilege of digging and carrying off in some convenient place." Although this was a reservation, instead of an exception, the meaning of the testator can not be mistaken. It is true that H. Gaston conveyed to the plaintiffs the whole estate without any exception or reserva-

tion; but this conveyance was so recent, that it can have no bearing upon the question of title.

From this review of the muniments of title on both sides, it is perfectly clear that so far as the documentary evidence goes, the defendant's lessor is the owner of the particular estate or easement, and that the plaintiffs hold the general estate in fee, subject to this servitude. And their only ground of claim is that the easement has been extinguished or transferred by some neglect or omission on the part of the legal owners. Subsequently, to the grant of the ore, etc., by Mudge, a pit was opened and ore dug and removed from it; but the pit has been closed and no act done in assertion of the grantee's right, for more than forty years. During all this time, the plaintiffs and their predecessors have enjoyed the entire use and occupation of the land. And the question now is, whether from the acts of the one party and the neglects and omissions of the other, the extinguishment or transfer of this servitude is to be inferred.

The right to enter, dig and remove ore, etc., granted to Brown, was an incorporeal hereditament, which could only be transferred by deed with all the formalities required by law for the conveyance of real property: *Thompson v. Gregory*, 4 Johns. R. 81. Do the facts disclosed in this case, furnish a sufficient foundation for the presumption of a legal conveyance of this easement from its owners to the owners of the land? The doctrine of the presumption of grants, though of modern origin, is well established and well understood.

It rests upon the same principles and is governed by the same rules as other circumstantial evidence.

The existence of one thing is inferred from the existence of other things which could not well exist without it. These presumptions are usually founded on adverse enjoyment for a length of time. The period generally fixed upon for this purpose, is twenty years. They are sometimes strengthened and sometimes weakened by other circumstances: 3 Stark. Evid. 1215, and cases cited; *Hill v. Crosby*, 2 Pick. (2d ed.) 466, note; *Jackson v. M'Call*, 10 Johns. R. 377.

This doctrine of presumption is usually applied to incorporeal hereditaments, as rights-of-way, of common, of fishery, of turbary, of lights, of water, of a market, and the like. See

the last citations. But the principle extends to corporeal as well as incorporeal hereditaments. A right to a pew may be presumed from uninterrupted enjoyment: *Darwin v. Upton*, 2 Saund. 175, note. So a grant of land may be presumed as well as a grant of an easement: *Richard v. Williams*, 7 Wheat. 107.

But in all cases the possession, to raise any, even the slightest presumption, must be adverse. It must be under a claim of right, and contrary to the interests of the owner. An enjoyment with the consent or consistently with the rights of the true owner, has no tendency to prove a conveyance from him: *Bealey v. Shaw*, 6 East. 214; *Keene v. Deardon*, 8 East. 263. The very ground of the presumption is the difficulty or impossibility of accounting for the possession or enjoyment without the existence of a grant, or some other lawful conveyance: *Devereux v. Duke of Norfolk*, 1 Price, 247. But, if the possession can be accounted for consistently with the title, no presumption arises: 2 Saund. 175, note; *Daniel v. North*, 11 East. 372; *Wood v. Veal*, 5 Barn. & Ald. 454. "The presumption of a deed from long usage, is for the furtherance of justice and for the sake of peace, when there has been a long exercise of an adverse right." "For instance, it can not be supposed that any man would suffer his neighbor to use a way with carts and carriages over his meadow, for twenty years successively, unless some agreement had been made between the parties to that effect:" *Crimes v. Smith*, 12 Coke, 4; *Bedle v. Beard*, 12 Coke, 5; *Mayor of Kingston v. Horner*, Cowp. 102; *Parker v. Baldwin*, 11 East. 488. But, says a learned judge of the Supreme Court of the United States, "presumptions of this nature" "are founded upon the consideration, that the facts are such as could not, according to the ordinary course of human affairs occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession. They can, therefore, never arise where all the circumstances are perfectly consistent with the non-existence of a grant: *Ricard v. Williams*, 7 Wheat. 109.

In the case at bar there was no adverse possession. The occupation of the owners in fee was consistent with the rights of the owners of the easement. In *Brandt v. Ogden*, 1 Johns.

R. 156, SPENCER, J. says "In order to bar the recovery of a plaintiff who has title, by a possession in a defendant, strict proof has always been required, not only that the possession was first taken under a claim hostile to the real owner, but that such hostility has existed on the part of the succeeding tenants." Here, although the occupation of the predecessors of the plaintiffs was not consistent with the exercise of the right claimed by the defendant, yet it was no infringement of that right. They did not dig any ore, they did not preclude any other persons from digging, nor exclude them from the land. Until the owners of the easement chose to exercise the right granted to them it was inoperative, and left the owners of the soil free to make such use of it as their interest might require: *Thompson v. Gregory*, 4 Johns. R. 81. By the principles of law governing easements of this kind, the owners of the soil had a perfect right to make every use of it which could be done without infringing the servitude. And as long as this remained unused they were entitled to the whole benefit of the land as much as if it did not exist. And in *Ricard v. Williams*, STORY, J., says: "It must appear that the party found in possession, entered without right and was in fact a disseizer; for, if his entry were congeable, or his possession lawful, his entry and possession would be considered as limited to his right. For the law will never construe a possession tortious unless from necessity. On the other hand, it will consider any possession lawful, the commencement and continuance of which is not proved to be wrongful; upon this plain principle, that every man shall be presumed to act in obedience to his duty, until the contrary appears." The exceptions contained in the several instruments, by which the title to this land was conveyed, apprized the owners of the extent of their rights, and their possession must be presumed to be under and according to their title. They did no act inconsistent with the easement claimed by the other party, or which indicated any claim on their part to the ore on the land. Their estate was subject to this servitude. They made no attempt to throw it off. They did nothing adverse to the rights of the owners of the easement, nothing to which they could object, or which would apprise

them of the existence of any hostile claim. No acquiescence, therefore, existed from which a conveyance could be presumed.

If the lessors of the defendant have lost their right, it is merely on the ground of *non-user*. They have produced good documentary evidence of ownership. No one else has shown any title ; and there is no adverse possession. Will a mere omission to work the mine extinguish or transfer the right?

In *Doe v. Butler*, 3 Wendell, 149, the court, by SUTHERLAND, J., say, "The presumption of a grant against written evidence of title can never arise from the mere neglect of the owner to assert his right." The evidence of title to corporeal hereditaments and of the transfers of it, is governed by most of the same principles which apply to other real estate. If the title to land depended on the same ground, there could be no question. The omission to occupy a house or a farm for any length of time, there being no adverse possession of it, would raise no presumption against the title of the owner. The legal possession will be in the owner; for the seizin follows the title. The same presumption applies to the case at bar, and the legal seizin of this incorporeal hereditament is in him who has the title, until it be shown that he has been ousted. If the omission to occupy raises a presumption against the one party, so it does against the other; for there was no actual occupation, and the legal possession is always presumed to be in the true owner.

If the owner of an estate suffer another person to enjoy it, and exclude him from it for a great length of time, the presumption is strong that the one has sold and the other has bought it. But, if neither has possession, the law raises no presumption about it, but leaves it to rest upon the legal title. If the omission to dig the ore by those who had the title to it, raises a presumption that they have parted with it, so the omission by the other party to take possession of the mine raises an equally strong presumption that they have not acquired it. And in the absence or balance of evidence, the legal presumption must prevail, that the possession of both was according to their respective titles.

Chancellor Kent, in 3 Kent's Comm. 359, says, that "a right acquired by use, may, however, be lost by non-user." Bracton, also, lib. 4, c. 38, § 3, lays down the same rule, that

incorporeal rights acquired by use may be lost by disuse. And the civil law contains a similar principle. And these are the authorities relied upon by the plaintiff's counsel. But we think the general propositions laid down, were accompanied by important limitations or qualifications. Kent adds, in the same sentence, that "an absolute discontinuance of the use for twenty years affords a presumption of the extinguishment of the right in favor of some other adverse right." But we do not think that the mere non-user of an easement, even for twenty years, will necessarily raise a presumption of its extinguishment, unless there has been during the time some acts done by the owner of the land inconsistent with, or adverse to the existence of the right. In *White v. Crawford*, 10 Mass. R. 183, it was directly decided, that an express grant or reservation of a right-of-way was not lost by a non-user of twenty years. And it is not easy to discover any legal difference between the effect of a deed proved by the writing itself, and one proved by circumstantial evidence. The same principle or qualification of the general proposition seems to prevail in the civil law. A servitude was presumed to be extinguished when the owner of the estate to which it was due, suffered the owner of the estate charged with it to erect such works on his estate as necessarily and entirely hindered the exercise of the right, and operated to annihilate it: Voet. Com. ad Pand. Lib. 8 Tit. 6, §§ 5, 6, 7; 3 Toullier's Droit Civil Francais, 506; Civil Law of Louisiana, Art. 815, 816.

We do not doubt the soundness of the general principle, nor its government of the cases properly coming within it. But we doubt its application to servitudes created by deeds. The rule is that rights acquired by use may be lost by disuse. The exclusive enjoyment of certain portions of the common elements of nature, as light, air, and water, which seem to be incapable of ownership or of conveyance, are the proper subjects of this rule. And to nothing does it more properly apply than to the right to the use of water for mill purposes. Water privileges are often acquired entirely by priority of occupancy, and, therefore, the continuance of the right should depend on the continuance of the occupancy.

But in the case at bar, as the right was neither acquired nor

evidenced by use, so we think it can not be lost by disuse. And as there was no adverse enjoyment to raise the presumption of a conveyance or release of it, the right of those holding the written title remains unimpaired.

New trial granted.

PARTRIDGE V. MCKINNEY ET AL.

(10 Cal. 181. Supreme Court of California, 1858.)

Abandonment will not be presumed from the lapse of time (shown in this case.)

Adverse possession as notice. Actual adverse possession is notice to one who purchases from one whose sole title is possession. If A sell to B, and B enter upon and remain in possession, a subsequent sale by A to C would be affected with notice resulting from such possession; but if B quit possession, and while out of possession, and his deed not recorded, A sell to C, the latter vendee is an innocent purchaser.

Idem. Where possession is notice and the possession ceases, the notice ceases with it.

Possession of tenants in common, inter se. The possession of one tenant in common is possession for all, but this rule does not apply where one tenant claims to hold adversely to the others.

Appeal from District Court, Ninth Judicial District, County of Shasta.

In the month of November, 1853, the defendant Townsend, and one Keller, commenced the construction of a dam and ditch, for the purpose of diverting the waters of Clear Creek, to be used for mining purposes. After making some little progress in the work, they, on the 16th of December, 1853, sold one undivided third interest to plaintiff, by a sealed instrument, which was never acknowledged or recorded. On the 15th of April, 1854, Keller transferred his interest to Townsend by written instrument, not under seal, and not acknowledged or recorded. On the 20th of May, 1854, the work was suspended by agreement of Partridge and Townsend, with the understanding that it should be resumed in the spring of 1855. The cause that induced this suspension of

the work, was the fact that a mining company had a claim in the bed of the stream above the dam ; and that it was agreed that this company should work their claim during the year 1854, and that Townsend and Partridge should be at liberty to resume and finish their dam and ditch at any time afterwards. Partridge left the vicinity and went to Marysville, where he remained until May, 1855, when he returned and claimed his interest in the property. In September, 1854, the mining company, having exhausted their claim, abandoned it, and Townsend at once resumed work, and so far completed the dam and ditch as to let the water into the ditch in December, 1854. There is nothing in the evidence to show that Townsend ever gave Partridge any notice that the mining company had abandoned their claim ; but there is distinct proof that Partridge, in the fall of 1854, notified Townsend that he would return in the spring of 1855 to resume the work. After the return of plaintiff, he did not commence suit until the 22d of May, 1857. On the 29th day of May, 1856, Townsend, by deed properly acknowledged and recorded, conveyed one undivided half of the property to defendant McKinney for the consideration of \$5,000; and on the 15th day of September, 1856, for the same consideration, he conveyed the other undivided half, by deed regularly acknowledged and recorded, to the defendant Elmore. The defendants, McKinney and Elmore, at once entered into possession, under their respective deeds; and were in possession at the commencement of this suit, claiming the entire property. It was conceded, on the trial, that they had each only paid one-half the purchase-money to Townsend, at the commencement of this suit. The plaintiff sued to recover the possession of one-third interest in the premises, obtained judgment in the court below, and the defendants appealed.

. ISAAC BOGGS, for appellant.

SPRAGUE & McMURTRY, for respondents.

BURNETT, J., after stating the facts, delivered the opinion of the Court.

There is nothing in the position that plaintiff had abandoned

his interest in the property in dispute. The law could not presume such an abandonment from the lapse of time: *Crandall v. Woods*, 8 Cal. 144; *Bird v. Lisbros*, 9 Cal. 1. And there was nothing in the testimony, as the court justly found, to show any intention to abandon.

But the most important point in the case is, whether the defendants, McKinney and Elmore, were entitled to the property, as against the plaintiff, upon the ground that they were subsequent purchasers in good faith and for a valuable consideration, they having first recorded their conveyances: Wood's Dig. p. 103, § 26. If this property is to be considered real estate, there can be no doubt as to the point.

In the case of the *Merced Mining Company v. Fremont*, 7 Cal. 317, 327, we held that "the owner of a mining-claim has, in practical effect, a good vested title to the property;" and that "his right to protect the property, for the time being, under the peculiar circumstances of the case, was as full and perfect as if he was the tenant of the superior proprietor for years, or for life." And, in the subsequent case of *Crandall v. Woods*, 8 Cal. 143, we held that "one who locates upon the public lands, with a view to appropriating them to his own use, becomes the absolute owner thereof, as against every one but the government; and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired." So in the case of *Bird v. Lisbros*, 9 Cal. 1, we held that "possession is evidence of title, and the party in possession is therefore deemed, in law, to be the owner; and when he conveys the land to another, he is deemed, in law, not to convey his evidence of title, but the title itself; of which the law, by reason of such evidence, adjudges him the owner, as against all not having a superior title."

In the same case we held, referring to the preceding case of *Bird v. Dennison*, 7 Cal. 297, "that when a party relied upon possession as his sole evidence of title, he must be held to know the acts of those through whom he claims; and if he claims the benefit of some of their acts, he must share the responsibility of those that may be against him, when another party is, at the time of his purchase, in the actual adverse possession of the premises. In other words, the actual adverse

possession of another party, at the time of the conveyance, will be notice to the purchaser, whose grantors only claimed by a possession short of the period fixed by the statute of limitations."

If, in this case, Partridge had sold to Townsend by a conveyance not recorded, and, afterward, while Townsend was in possession, claiming the entire property as his own, Partridge had sold to another, by deed duly acknowledged and recorded, the second purchaser from Partridge would have been deemed to have purchased with notice; and would not, therefore, have been considered "a subsequent purchaser in good faith;" and Townsend would have been permitted to show the real state of the case as against this second vendee of Partridge. But the facts of this case are very different. The whole title of all parties rested upon possession only. Partridge had once been in possession with the others; but his possession was subsequent to that of Keller and Townsend. The conveyance from them to Partridge not having been recorded, there was no *record* notice that the title to the one-third interest had ever passed to Partridge; and he not being in possession at the date of the separate deeds from Townsend to McKinney and Elmore, they had no notice of any kind, and were, therefore, innocent purchasers for value. Conceding that the possession of Partridge, whilst it continued, was notice to all the world, the moment that possession ceased, the notice (which was only the legal *effect* of such possession) also ceased. It is true that the possession of one tenant in common is possession for all; but this possession in one for all ceases the moment it becomes adverse to the others: 4 Kent. 370. Townsend claimed to hold, and did hold, the entire property adversely to Partridge, and could not, therefore, be deemed, in law, to hold for him.

Our conclusion is, that the plaintiff had no right, in this form of action, to recover against any of the parties defendant. Although the question does not arise in this case, as it now stands upon the record—and we, therefore, make no binding decision upon the point—yet we may remark that it would seem, from the testimony contained in the record, that plaintiff would have a right to an account, and for the value of his interest sold, as against Townsend; and a remedy against

McKinney and Elmore, as debtors of Townsend, under proper circumstances.

For these reasons, the judgment is reversed, and a new trial ordered, with leave to the plaintiff to amend his complaint. We give this leave to amend in order to prevent the bar of the statute of limitations.

FIELD, J.—I concur in the judgment.

CALDWELL V. COPELAND ET AL.

(37 Pennsylvania State, 427. Supreme Court, 1860.)

Surface possession after severance. The rule that possession of the surface is possession indefinitely downward, does not apply after there has been a grant or reservation of the minerals separate from the surface ownership.

What constitutes adverse possession. After severance of the surface and mineral titles, acts of ownership, such as constitute possession and confer title under the statute of limitations, must be acts done with reference to the mines, *as such*.

Land. Mines are land. The mineral right, after severance from the surface title, is land.

Prescription distinguished from adverse possession. Prescription may give the right to work a particular mine, but can not give title to the mine. Prescription refers to hereditaments incorporeal only, but the title to a mine as land, must be made out by documentary evidence or adverse possession.

Error to the Common Pleas of Westmoreland County.

This was an action of trespass *quare clausum fregit*, brought by William S. Caldwell against Thomas Copeland and John Copeland, for an alleged breaking and entering on the lands of plaintiff, in Sewickley township, containing about 150 acres, and carrying away 10,000 bushels of bituminous coal. To a declaration in the usual form, the defendants pleaded "not guilty," and on this issue, the parties went to trial. The case was this:

James Caldwell, prior to the 27th day of May, 1831, was

the owner of the tract of land from which the alleged trespass in taking the coal was committed. On that day he conveyed to George Greer two pieces of land, one containing 6 acres and 47 perches, and the other 10 acres and 50 perches, being part of the tract he then owned and lived on; also the coal privilege in the following words: "Also the full right, title and privilege of digging and taking away stone coal to any extent he, the said George Greer, may think proper to do or cause to be done, under any of the other land now owned and occupied by the said Caldwell, provided, nevertheless, the entrance thereto, and the discharge therefrom, be on the said described premises."

By sundry conveyances, the entire right to the land and the coal became vested in William McClure and Thompson Bell, who, on the 7th of May, 1848, made partition of the premises, by means of which the tract on which the alleged trespass was committed, became the property of McClure, who, on the 16th of March, 1853, leased to the defendants, by whom the entry complained of was made, and the coal taken away. The plaintiff claimed the *locus in quo*, by devise from his father.

The court below charged the jury, that, as the Supreme Court, in the case of *Caldwell v. Fulton*, 7 Casey, 475, had construed the deed from James Caldwell to George Greer to be a conveyance of the entire property in the coal, they were bound so to regard it, and the point to be considered then, was whether Greer, and those claiming under him, had lost this right by the statute of limitation; instructing them, that to bar his right, there must have been an actual adverse, exclusive, and undisturbed possession for twenty-one years, which terms were explained by the court, and their application to the case commented on.

Under this charge there was a verdict in favor of the plaintiff, for \$176.25, and judgment having been entered thereon, the defendants sued out this writ, and assigned for error the following matters, to-wit:

1. The court erred in charging the jury as follows: "Being thus the owner, has George Greer, and those claiming under him, lost it by the statute of limitation? To bar the right of the owner by the statute, there must be an actual, adverse, exclusive and undisturbed possession for twenty-one years. It is said old Mr. Caldwell and the plaintiff under him have

had such possession. Was it actual? The coal was taken from the land, the surface of which is admitted to have been in the actual possession of the plaintiff, and was so all the time. This actual possession of the surface carries with it the actual possession downward, perpendicularly, through all the various strata. The actual possession, therefore, was in the plaintiff."

2. The court erred in charging the jury as follows: "Was it adverse? this is a question for the jury. After the deed of the 27th of May, 1831, did old Mr. Caldwell claim the coal now claimed, and did he admit the right of Greer to it? did he claim it as his own property, in his own right? On this subject the jury will take the deed, and consider the fact that he had conveyed himself to Greer, and also his acts and declarations recognizing the right of Greer, and also the evidence that he claimed it himself. All the evidence on the subject, of the manner in which he and the plaintiff held, will be considered. If the jury believe they held and claimed it as in their possession, it being their property, and held it so for twenty-one years, then it would be an adverse possession; but if the jury believe that he only claimed to hold possession in subservience to the terms of the deed, then the possession was not adverse."

3. In charging the jury as follows: "It must be exclusive. If the possession of Caldwell was in common with that of Greer, both occupying the whole or portions, and both claiming title, in that event the possession would not be exclusive and the statute would not avail the plaintiff."

4. In charging the jury as follows: "It must also be continued. If the actual possession of the plaintiff—supposing the jury should find it to be an actual possession—was interrupted by the entry of the defendants or those under whom they claim, then the statute would not apply. But an entry to toll the bar must be a manifest, open, and notorious going on the land with a view to require possession and challenge the right of the occupant. If not done with that view, but a mere accidental entry on the premises with a view to a different object, such would not displace the occupant or remove the bar of the statute."

5. In charging the jury as follows: "We are requested to

say that the entry made by and approved by William Bell, if believed, would interrupt the statute. If made with a design to take or require the possession of the Caldwell tract, and to exercise the right under the deed, then it would have the effect to displace the possession of Caldwell. But if that entry was made without a knowledge of the fact that it was on the Caldwell tract, and with no design to take possession, or challenge the right of Caldwell, or to exercise their privilege under the deed, then it would not be such an entry as would take away the operation of the statute."

6. The court erred in the answer to defendant's first and second points, which points and answers are as follows:

1st. If the jury believe the testimony of William Bell, the entry made and proved by him would interrupt the statute.

Answer. If made with a design to take or require the possession of the Caldwell tract, and to exercise the right under the deed, then it would have the effect to displace the possession of Caldwell: but if the entry was made without a knowledge of the fact that it was on the Caldwell tract, and with no design to take possession or challenge the right of Caldwell, or to exercise their privilege under the deed, then it would not be such an entry as would take away the statute.

2d. The evidence in the case does not establish such an adverse claim by Caldwell as will confer a title by the statute of limitations.

Answer. "This point is answered in the negative."

For plaintiff in error, it was argued:

1. That although, ordinarily the possession of the surface of the land is the possession of the whole, yet, when coal in the ground is conveyed to a stranger, his actual possession is gone, and a constructive possession is in the purchaser, until legally ousted. Caldwell's possession consisted in the right which he retained, and was not inconsistent with that which was granted to Greer. The court, therefore, erred in saying that residence on the surface gave Caldwell such a possession of the coal as would answer the requirement of the statute.

2. The court should have instructed the jury, that there was no evidence of adverse possession by plaintiff, instead of submitting that fact to them, for the evidence did not show actual, adverse, visible, notorious, hostile, and continued pos-

session for twenty-one years, all which is necessary: 7 Casey, 279.

3. As to the entry proved by William Bell (to wit, a working of the coal-mine, from 1845 to 1848, under an agreement with Thompson Bell and William McClure, with the knowledge of Caldwell and without any denial of their right to work the mines), the court below erred in refusing to charge the jury, that it was sufficient to avoid the statute of limitations. The claim of right was distinct, and the effect of the proof was for the court, and not for the jury, to decide when it was submitted: 10 Casey, 74; 9 Watts, 28; 1 Jones, 212; 3 Harris, 525; 2 Jones, 128; 7 S. & R. 129.

Cowen, for defendant in error, contended that the Caldwells had always held adversely, openly and notoriously against the right now set up by the alienees of Greer, under his deed, claiming land, coals, and all as his. He now resists the right of these claimants averring that their right is barred by the statute of limitations, and that there was, therefore no error in the instruction by the court on the trial.

The opinion of the court was delivered, January 7th, 1861, by WOODWARD, J.

It is apparent from that part of the charge of the learned judge which is recited in the first error assigned, that he made the title of Caldwell to the coal in dispute to depend altogether on the actual possession which Caldwell had maintained of the surface, and not at all upon his occasional entries to take coal, of which there was evidence. The judge's language was: "This actual possession of the surface carries with it the actual possession downward perpendicularly through all the various strata. The actual possession, therefore, was in the plaintiff."

This proposition would be unquestionable, if there had not been a severance of the title to the mine-right from that of the surface by the deed of 27th May 1831, Caldwell to Greer. But it is not true that after such a severance, whether by reservation or grant, the possession of the surface is possession of the underlying mineral. That mines may form a distinct possession, and a different inheritance from the surface land, has been long settled in England, as may be seen by reference to the cases cited in the two opinions heretofore delivered in

this case, and reported in 7th Casey, 476 and 482. See also *Barnes v. Mawson*, 1 Maule & Sel. 84.

It is a common occurrence in mining districts there, not only that the ownership of the soil is vested in one person, and that of the mines in another, but there are frequently distinct ownerships of the mineral in the same land. Thus, one person may be entitled to the iron ore, another to the limestone; a third to one seam or stratum of coal, and a fourth to a distinct stratum. Title to any of these minerals, quite distinct from the title to the surface, may be shown by documentary evidence—or, in the absence of such evidence, or in opposition to it, title to them may be made out by proof of possession and acts of ownership under the statute of limitations. The acts of ownership, however, which constitute possession and confer title, must be distinct from such as are exercised over the surface: *Tyrwhitt v. Wynne*, 2 Barn. & Ald. 554; *Cullen v. Rich*, Bull. N. P. 102. And see the same case under the name *Rich v. Johnson*, 2 Strange, 1142. So entirely is a mineral right, after severance, a claim to land, and therefore not an incorporeal hereditament, that title to it can not be acquired to it by prescription. Prescription lies only for incorporeal rights, not for land. It may confer a right to work a particular mine, as it may confer a right-of-way across another's estate, or a right to fish in another's waters; but the title to the mine itself, like title to land, must be made out by documentary evidence, or under the statute of limitations: *Wilkinson v. Proud*, 11 M. & W. 33, and the cases therein cited.

It used to be said that if a grant of mines be made without livery of seizin, the grantee would take only a power to dig and work them: Touch. 96. But now by statute 8 & 9 Vict. c. 106, all corporeal hereditaments are declared, as regards the conveyance of the immediate freehold to lie in grant as well as in livery. And from *Chetham v. Williamson*, 4 East, 476, and *Wilkinson v. Proud*, above cited, it would seem that the law was so even before the statute was passed.

The law of livery has never embarrassed our conveyancing in Pennsylvania.* There is no more reason why mines in another's land, whether opened or unopened, may not be held by a deed duly acknowledged and recorded, than why land in its

* *Ante p.* 173.

most ordinary signification may not be so held. In other words, mines are land, and subject to the same laws of possession and conveyance.

But whether Caldwell conveyed to Greer the coal mines in his land, or only granted a license to enter and take coals, depended on the construction of the deed above referred to, of 27th May, 1831, and that was carefully considered and fully decided in the opinions reported in 7 Casey. It was then held that the deed was not a license but a conveyance of the fee of the mine—that it was a grant of land and not of an incorporeal hereditament. That ruling is not questioned in the present case, and it is decisive against the plaintiff's action so far as it is founded on a possession of the surface. For no length of possession of the surface merely, could divest the title granted by that deed. Adverse possession of the mine by the owners of the surface, for the statutory period, would avail as title, but the case was not ruled below on this ground, and therefore we do not consider whether the evidence made out such a possession in the plaintiff and those under whom he claims. On the ground assumed, that possession of the surface for more than twenty-one years was title to the mine, the court was clearly in error.

And in the second assignment we think there was error. If there was no possession in Caldwell of the coal-mine as a coal-mine, and independently of his possession of the surface, then there could be no question of adverse holding, to submit to the jury. As to his *claim* of the coal, in opposition to his deed, this was not possession within the statute. At most it was only evidence of a prospective right, and corporeal hereditaments, I repeat, are not held by prescription.

If Bell's entry was not made "to exercise the privilege under the deed"—that is, if it were not in pursuance of the deed and whatever rights it conferred, the answer given to the defendants' first point was right. No entry would toll the statute that was not made or authorized by some person having rights under the deed. But if it were an entry under and in pursuance of the deed, it would toll the running of the statute in favor of the grantor. The language of the learned judge in answer to this point was not quite as clear as we could have wished, but as we understand it, we see no error in it.

We say nothing about his reputed answer to the 2d point, because it is denied by the counsel for the plaintiff that such a point was propounded or such an answer given, and the record does not prove them.

The judgment is reversed, and a venire facias de novo is awarded.

¹ **YANKEE JIM'S UNION WATER CO. V. CRARY.**

(25 California 504. Supreme Court of 1864.)

Right of appropriation of water. The right to the use of a water course on the public mineral lands, and the right to divert and use the water therefrom, is acquired by the first appropriator.

² **Lost by adverse possession—Grant presumed.** Such right of the appropriator may be lost by the adverse possession of another. And after an adverse enjoyment for the period fixed by the statute of limitations, a grant will be presumed.

Rebuttal. After defendant has proved an adverse possession, the plaintiff may show that it was not continuous or uninterrupted, but may not return upon his original proof, unless in a case addressed to the discretion of the court.

Improper testimony cured by instructions. Where testimony is improperly admitted, but afterward excluded by instructions, it may not under all circumstances, amount to error sufficient to entitle to a new trial.

Water returned. Where water is taken at a point above the plaintiff's ditch, and, after being used, is returned so that it reaches plaintiff's ditch without material diminution in quantity or quality, plaintiff has no cause of action.

Appeal from District Court, Eleventh Judicial District, Placer County.

The defendant's ditch was excavated on the side of the mountain above plaintiff's ditches, and took the water from the same stream at a point about three-fourths of a mile above plaintiff's ditches. The defendant used the water for working his claim, and then allowed it to flow into plaintiff's ditches, down another ravine about a mile distant from the one where it was diverted.

Defendant recovered judgment, and plaintiff appealed.

¹ Sometimes cited as *Union W. Co. v. Crary*.

² Cited *American Co. v. Bradford*, 27 Cal. 360; *Davis v. Gale*, 32 Id. 35; *Woolman v. Garringer*, 1 Mont. 544.

The first instruction, given at defendant's request, was as follows :

" If the defendant and his grantors have been in the continued, adverse, uninterrupted possession, use and enjoyment of the waters in dispute for the period of five years preceding the commencement of this suit, the jury must find for the defendant."

The second instruction, given at defendant's request, was as follows :

" If, after defendant's use of the water, it flows back into a cañon, and, without material diminution in quantity or quality, it is again conducted by plaintiff into ditch, and used by them, as it would have been used but for the diversion by defendant, the jury must find for defendant."

The other facts are stated in the opinion of the court.

TUTTLE & HILLYER, for appellant.

JO. HAMILTON and P. L. EDWARDS, for respondent.

By the Court, RHODES, J.:

The plaintiff is the owner of two water ditches, constructed for mining purposes, which conduct the water from a cañon, and the defendant owns a third ditch which heads in the same cañon, above the plaintiff's ditches. The plaintiff claims the right to the water, on the ground of a prior appropriation and a continuous user down to a time subsequent to May, 1861, when, it is alleged, the defendant diverted the water into his ditch. The object of the action is to recover damages for diverting the water, and to enjoin the defendant from the further diversion of it from the plaintiff's ditches. The defendant had a verdict and judgment, and the plaintiff appeals from the judgment and the order denying the motion for a new trial.

In considering the errors assigned, several points may be passed upon at the same time.

1. The plaintiff was not entitled to a judgment on the pleadings, for the defendant denies the right of the plaintiff, except where the water has receded to four inches, and he sets up title in himself; and we hold that those matters, as set up in the answer, do constitute a defense to the plaintiff's action.

2. After the plaintiff had rested and the defendant had introduced his evidence, the plaintiff "offered to prove by William McClure, one of the former owners of plaintiff's ditches, and James McClure, former agent, that in 1853, 1854, 1857, 1858, 1859 and 1860, plaintiff had possession of and used in its ditches, during all the summer season except when there was a surplus, [the] water in controversy," and the testimony was excluded on the objection of the defendant. The plaintiff alleges in its complaint that it now owns two ditches; that the ditches were constructed by its grantor in 1851 and 1852; that by means thereof, the plaintiff's grantors diverted and appropriated the waters of the cañon; that the plaintiff has owned the ditches since August, 1853; and that by means of the ditches, since they were excavated, the plaintiff and its grantors have continuously, up to May, 1861, used, appropriated, diverted, and enjoyed the waters flowing down said cañon above the plaintiff's ditches.

The defendant, in his answer, after denying that the plaintiff or his grantors ever had or claimed any right to the water of the cañon above where his ditch heads, except as the owners of his ditch permitted them to use such water, avers that he is the owner of said ditch, and that he and his grantors, ever since the summer of 1853, have been the owners and in the peaceable and quiet possession thereof; that the same was constructed, and ever since has been used, for the purpose of conveying the waters of said cañon; that they have had the quiet and peaceable possession of said waters, and have continuously, during nine years past, diverted all of said waters that could be conveyed in their ditch; that they have had the right so to do; that by "virtue of such continuous use, enjoyment, and appropriation of said water," which use and possession "has been held by them adversely and against all claimants," the defendant is the owner, and entitled to the use, enjoyment, and diversion of said water; and "that, by reason of the nine years' use and enjoyment and diversion, and the adverse possession of the same, he has acquired the title thereto;" and that the defendant has never disputed the plaintiff's title, until the commencement of the present suit.

The plaintiff thus asserts title founded upon prior appropriation in 1851 and 1852, and the continued appropriation

down to the time of the alleged diversion by the defendant in 1861; and the defendant asserts title acquired by prior appropriation in 1853, together with continuous use from that time to the commencement of the action in 1862. He also relies upon title by prescription. The court below and the plaintiff have treated the answer as setting up the statute of limitations in bar of the action. We do not so understand the answer. Although it is not pleaded with great accuracy or technical precision, it contains all the substantial allegations necessary in a case where a party sets up title to an incorporeal hereditament, which has accrued to him by the continued, uninterrupted adverse use and enjoyment—a title by prescription. The right to the use of a water-course in the public mineral lands, and the right to divert and use the water taken therefrom, is acquired by appropriation and user, the person first appropriating it being deemed to have the title, as against all the world, except the United States and persons claiming under them, to the extent that he thus appropriated it before the rights of others attached. The rights thus acquired may be held, granted, abandoned, or lost by the same means as a right of the same character issuing out of lands to which a private title exists. The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted, and adverse enjoyment of the water-course, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him: *Bealey v. Shaw*, 6 East. 208; *Balston v. Bensted*, 1 Camp. 463; *Ricard v. Williams*, 7 Wheat. 59; *Williams v. Nelson*, 23 Pick. 141; *Colvin v. Burnett*, 17 Wend. 564; *Hammond v. Zehner*, 23 Barb. 473.

The defendant having proven facts sufficient to warrant the jury in presuming a grant in his favor, the plaintiff, not wishing to rely upon the proof offered by it upon the same points, was at liberty to produce evidence tending to show that the defendant's enjoyment of his asserted right had not been continuous, or uninterrupted, or adverse; but it was not authorized for that purpose, to enter upon its original case, and again prove the same facts that were proved by it in making its

prima facie case. At least, such evidence would be admissible only in the discretion of the court below, in furtherance of justice—not in rebuttal, but as a part of the plaintiff's original case.

The other issue between the parties was, as already stated, a contest between them as to which had the better right, founded on prior possession and continued user. The plaintiff had called upon the same witnesses that he then offered, to prove its continuous possession and use, and they had testified concerning those matters, and the offer was in substance to prove the same facts (perhaps more in detail) that those witnesses had testified to in chief for the plaintiff. The examination of those witnesses upon the same point was not permissible, except in the discretion of the court.

3. The plaintiff further assigns for error the admission of the testimony of Randolph and the deposition of Beegan, so far as the same related to an arrangement between the defendant's grantors and the plaintiff's agent, on the ground that there was no proof that the agent had authority to make such an arrangement. It is sufficient on this point to say, that the court, by its instructions, excluded that testimony from the consideration of the jury, the court instructing them that the agent's acts in that behalf were void, because he had no authority, and there was no proof of the ratification of his acts by the company.

The plaintiff further objects to the testimony of those witnesses, because it was attempted to be proven by them, by parol, that the defendant's grantors had sold and conveyed the ditch to him. It is alleged in the answer, and not denied in the replication, that the persons who constructed the defendant's ditch sold the same to two persons, who afterward sold it to the defendant, and no evidence was needed on that point. Those sales were proven by parol evidence, without objection on the part of the plaintiff, by two other witnesses, and the record contains no objection to the testimony of Randolph on that ground. The admission of the testimony complained of, though improper as it was offered, yet under the circumstances did not amount to an error sufficient to entitle the plaintiff to a new trial.

4. The first instruction given at the request of the defend-

ant was proper, under the pleadings. . If objectionable at all, it is on the ground that it does not go far enough, for the court might have charged the jury that if they found that ' the defendant and his grantors have been in the continued, adverse, uninterrupted possession, use, and enjoyment of the waters " for five years preceding the commencement of the action, they would be justified in presuming a grant to the defendant. The charge, as given, had relation to the probative facts upon which title by prescription depended, rather than to the ultimate fact of title. In that view, it was not erroneous: *Hammond v. Zehner*, 23 Barb. 473. The second instruction was proper, for if the plaintiff had title to the water, and had not been injured by the acts of the defendant, the plaintiff had no cause of action against him.

The instructions concerning the adverse possession and prescription, given at the request of the plaintiff, were very favorable to it, and obviated whatever objection there might be to the defendant's instructions upon the same matter. The remaining points in the assignment of errors do not require a separate consideration.

Judgment affirmed.

SAWYER, J., concurring specially:

I concur in the judgment.

THE SUSQUEHANNA AND WYOMING VALLEY R. R. &
COAL Co. v. QUICK.

(61 Pa. St. 323. Supreme Court of Pennsylvania, 1869.)

Exhibit to deposition. A paper, found pinned to a deposition, not referred to in or about the deposition, and not aided by parol testimony, is not an exhibit so identified as to be admissible.

Release to witness. But such paper, being a release of warranty to the witness, being otherwise proved, is admissible, independent of the deposition.

Release of warranty is a deed concerning lands admissible to record, and may be proved in evidence under the recording acts.

A general warranty is a real covenant descending with the land, and passing to assigns by its express terms.

Lost paper supplied by copy. A witness testified that a certain paper had been sent to some attorney several years ago, and after search could not be found. *Held*, sufficient proof of loss to let in the copy produced.

Leading question defined. A leading question is one which indicates the answer which the party desires.

Ouster by co-tenant retaining profits exclusively. A mere reception of rents and profits by one tenant in common will not prove an ouster, but open and notorious possession and retaining the profits exclusively for 21 years, is sufficient to justify a finding both of ouster and adverse possession.

Case of trust distinguished from co-tenancy. In cases of express trust or of direct confidence, the evidence to show a denial of the relation between the parties must be of stronger character than if the case be that of co-tenancy alone, but in all cases there must be proof of such positive acts or continued conduct, as tend to bring home notice to the party to be affected.

Error to the Court of Common Pleas of Luzerne County.

Before THOMPSON, C. J., READ, AGNEW and WILLIAMS, JJ.

SHARSWOOD, J., at *nisi prius*.

This was an amicable action of ejectment brought by Peter A. Quick against the National Anthracite Coal Co., in whose place the present plaintiff in error was afterward substituted. The land sued for consisted of two tracts, partly in the borough of Providence and partly in the borough of Scranton, to wit: Lot No. 42, containing 383 acres, certified to Thomas Wright, and a tract of 206 acres, the southern part of Lot No. 43, certified to James Lewis.

The case was tried before ELWELL, P. J., of the 26th judicial district.

The plaintiff gave in evidence a patent, dated June 10th, 1810, to Thomas Wright, for 383 acres of land in Providence, being lot No. 42. Also the will of Wright, proved April 22d, 1820, appointing Asher Miner his executor, with power to sell his real estate, and deed of August 1st, 1825, from Miner, executor to John B. Quick, for lot No. 42. Also survey of May 21st, 1825, to Daniel David, for 208 acres, 96 perches, part of lot No. 43 and survey of October 25th, 1825, to James Lewis, for 206 acres, the other part of lot 43. No. 42, the northernmost lot, is referred to in this case as the "Miner

lot;" the 208 acres are next south of it, and referred to as the "David lot;" the 206 acres are the southernmost part, and are referred to as the "Lewis lot"—the land in controversy being the Miner and the Lewis lots. The plaintiff gave in evidence also, patent, October 25th, 1825, to J. B. Quick, Warmoldus Cooper and Abram Lefoy, for lot No. 43, one-fourth to Quick, and three-fourths to Cooper and Lefoy. Also deed with general warranty, February 3d, 1844, from J. B. Quick to Peter A. L. Quick, for the grantor's interest in the Miner lot and in the Lewis lot, "being the undivided three-fourths" of the Miner lot and all the Lewis lot.

Slocum, a witness for plaintiff, testified that J. B. Quick entered on these lands in 1825 or 1826, and made coal openings on them; there was a house on the David lot and one on the Miner lot. The witness named a number of persons who resided on the land. Jacob R. Quick went there in 1841, and was there some years. J. B. Quick was coming and going for several years, superintending the taking out coal.

Whitbeck, another witness, testified that there was a house in 1828 on the Miner lot and one on the David lot; he also named a number of occupants up to about 1852 or 1853, when Jacob R. Quick came; in 1855 one Rummerfield came; he and Jacob Quick were put out in 1856 by the sheriff; the property was called the "Quick property."

Swartz and a number of other witnesses testified that J. B. Quick commenced to uncover coal about 1825, and continued taking coal out and superintending for some time.

Griffin testified to the same; and also that the property was occupied until 1856 by a number of persons successively, who were always understood to be tenants of Quick; Quick was put out in 1856; witness had heard of no other claim till then.

Lanning testified substantially as Griffin. There was evidence also that after the tenants were put out by the sheriff the houses were burned.

The assessments in Providence in 1826 and 1827 were to John B. Quick; from 1828 to 1831 to George Biddis; from 1832 to 1842, except 1841, to F. A. L. Smith. In 1843 to Smith, J. B. Quick and J. R. Quick. In 1844 to T. Clark, Jno. B. and Jacob R. Quick. In 1845 to Clark, Jacob R. and Peter A. L. Quick. In 1846 to Peter and Jacob R. Quick and

J. A. L. Smith. From 1847 to 1849 to Clark and Jacob Quick. From 1851 to 1853 to Jacob. In 1856 to Peter, "383 acres called the Miner lot." In 1841, 1850, 1854 and 1855 there were no assessments.

Jacob R. Quick, a son of John B. Quick, gave testimony showing possession in his father, taking coal, renting, etc., by him or those claiming under him, from 1826 to 1856, when the occupants were put out by the sheriff.

The plaintiff offered the deposition of John B. Quick, taken September 4th, 1858, before Samuel S. Thrall, Esq., together with a release dated August 10th, 1858, from the plaintiff to the witness, duly acknowledged on the same day before Samuel S. Thrall, Esq., as follows:

"Know all men by these presents, that I, Peter A. L. Quick, of Milford, in the county of Pike, and State of Pennsylvania, for and in consideration of the sum of one dollar, to me in hand paid, have and by these presents do remise, release, discharge and exonerate John B. Quick, of same place, from all liability for, on or account of any or all warranties, covenants or liabilities contained in a certain deed, dated February 3d, 1844, from the said John B. Quick to Peter A. L. Quick, for land and premises lying and being in Luzerne county, which said deed is recorded in said Luzerne county, in Deed Book No. 50, page 428, etc., on the 3d day of July, A. D. 1844."

The release was not noted by the justice who took the deposition, was not indorsed, etc. An objection in writing to the competency of the witness was made before the justice at the taking of the deposition. The objection with all other papers connected with the deposition were fastened together in the usual way, but the release was merely pinned between the leaves. The defendants objected to the testimony on the ground of the incompetency of the witness, there being no evidence that the release had been executed before taking the deposition, and it was not identified as an exhibit accompanying it. The court admitted parts of the depositions and sealed a bill of exceptions for the defendants.

The witness testified that he had been in possession of the lands in 1825; he never gave up possession, leased the land in 1841 to his son Jacob R. Quick; he and those under him kept the taxes paid up until the plaintiff went into possession.

John Q. Smith, his sister's son, had been in possession under him eight or nine years, in 1855. The plaintiff gave in evidence by Jeffrey Wells, under objection and exception, that F. A. L. Smith was agent of J. B. Quick for these lands, and then gave in evidence a lease, dated March 31st, 1834, from F. A. L. Smith to J. Q. Smith for lots No. 42 and 43, with other lands for one year at a rent of \$100. Also lease, dated April 1st, 1835, from J. B. Quick to F. A. L. Smith for same lands for five years at \$50 rent. Also lease, dated April 19th, 1841, J. B. Quick to J. R. Quick, for three years at the rent of \$25. Also lease of plaintiff to Thomas Baker, dated March 21st, 1846, for the Miner and Lewis lots with an acceptance by Baker of notice to quit at the end of two years from April 1st, 1848. Also lease between same parties for same lands for one year from April 1st, 1848, and leases dated March 22d, 1832, and April 1st, 1835, from plaintiff to Rummerfield for same lots together, for two years. Also lease, March 9th, 1855, from plaintiff to D. T. Lewis for privilege of taking coal from the Lewis lot and for house on the Miner lot till April 1st, 1857.

The plaintiff then gave in evidence a deed, dated May 8th, 1826, from J. B. Quick to George Biddis, for an undivided fourth of the Miner and David lots, the consideration being \$6,000, and a deed of May 9th between the same parties for one undivided fourth of the Lewis lot. Also evidence for the purpose of showing that the deeds to Biddis were given as security for money which had since been paid.

The plaintiff having closed, the defendants gave in evidence the will of George Biddis, proved September 1st, 1828, appointing Hugh Ross executor with power to sell his real estate; also deeds September 16th, 1830, Hugh Ross, executor to F. A. L. Smith: April 21st, 1841, Smith to Thomas Clarke. Also record of ejectment, June 9th, 1842, Thomas Clarke against Jacob R. Quick, for 800 acres. August 19th, 1843, judgment for plaintiff for one-fourth of premises by agreement of J. R. Quick, filed in the suit: also deed September 29th, 1825, John B. Quick to Cooper and Lefoy, for three-fourths of the Miner and David lots: also deed John B. Quick, Cooper and Lefoy, to Isaac Frost and Josephus Loring, for the Miner, David and Lewis lots, in trust for an association for the purpose of min-

ing, etc., composed of J. B. Quick, Cooper, Lefoy and others named, and such others as may become associated with them, John B. Quick's interest being ten-fortieths, Cooper's three-fortieths, Lefoy's two-fortieths, and the remainder for the other associates, having each a number of fortieths set out in the deed, the business to be conducted in the manner determined by a board of directors of the association, and whenever the premises should cease to be occupied as contemplated by the association, and the association should be dissolved or discontinued, the trustees to convey the property to the associates according to their respective interests at that time. Amongst other recitals of title was a conveyance, dated June 17th, 1825, to John B. Quick, from David, of his lot.

The defendants then offered a copy of the articles of the association of the company, (The Lackawanna Coal Company), mentioned in the deed of trust and other papers with the deposition of J. M. Cooper, who testified:

"That association did business in the city of New York. It was not incorporated. The original articles were sent I think several years ago to some attorney in Wilkesbarre, and have since been lost. Diligent search has been made for them and they can not be found. (Witness shown exhibit attached marked "B.") This is a verbatim copy of the Articles of Association of The Lackawanna Coal Company, before mentioned.

(Witness shown book marked exhibit "D.") This book is the Stock Transfer Book of the said company. (Witness shown exhibit attached marked "G.") The signature to this paper I think is the signature of John B. Quick. The stock mentioned in this certificate was sold to me. I became the purchaser of all the stock of the Lackawanna Coal Company. I received a deed from Isaac Frost, the remaining trustee. I think Mr. Loring was dead at that time. * * That association was continued until I purchased out all the shares. The organization was kept up according to the original articles until I sold out to Mr. Phelps. It was kept up until about June, 1849. I sold out to Mr. Phelps, May, 1853."

The plaintiff objected to the offer; it was rejected by the court except so far as the books may show transfers by the original *cestuis que trust*. The plaintiff offered twice the

transfer of the shares of stock in the company, made January 11th, 1826, by J. B. Quick to A. Quackenbush, in connection with the testimony of Cooper and of Quackenbush (the latter not furnished in the paper-book). The offer was rejected, and a bill of exceptions sealed. They gave in evidence deeds of August 7th, 1840, and May 18th, 1853, of Frost and Loring as trustees, and a number of the members of the association—J. B. Quick not being one—to John M. Cooper, for the Miner, David and Lewis lots. Also record of an ejectment for 800 acres, being the Miner, David and Lewis lots, by Frost and Loring, trustees, against Jacob R. Quick, commenced April 7th, 1846, in which, on the 4th of April, 1848, Thomas Clark was substituted as co-defendant for one-fourth of the land. Judgment was entered October 5th, 1854, for plaintiffs for all the land claimed in the writ, and at August Term a *pluries habere* was returned executed. This evidence was admitted after proof by A. T. McClintock, Esq., who appeared on the record for the defendant, that he had been employed by P. A. L. Quick, and represented his interest in the case. The defendant gave evidence by various conveyances that the title of Clark, and the legal title of the trustees were vested, January 25th, 1856, in The National Anthracite Coal Company. On the 5th of April, 1864, the whole title became vested in the defendants.

The plaintiffs gave evidence also by E. B. Harvey and others as to the existence and loss of the articles of association of the Lackawanna Coal Company.

In rebuttal, the plaintiff examined Jacob R. Quick, who testified that he was at the office of Mr. McClintock when the plaintiff was there. The plaintiff then asked: "Whether P. A. L. Quick asked Mr. McClintock if his rights would be in any manner affected by that suit, and that Mr. McClintock replied they could not, and that he could go home." The question was objected to by defendant as leading and as not being evidence. The evidence was received, and a bill of exceptions sealed.

The witness testified: "Peter A. L. Quick asked Mr. McClintock if the ejectment suit brought against me would in any manner affect him. He said he could not be any party to the suit; he was not recognized in the writ. He said he

had no interest, he had nothing to do with the case; he might as well go home; it did not affect his claim in any shape or form."

In order to present an intelligible view of this complicated case, the lucid charge of Judge Elwell is given in addition to the foregoing statement.

The defendants submitted the following points:

2. To acquire a title under the statute of limitations by John B. Quick, against his own grantees, notice of his intention thus to acquire title must be shown to have been direct, clear, and positive, and the statute will run only from such notice.

4. The assessments given in evidence by plaintiff in this case, are not consistent with any claim of possession by John B. Quick, of any portion of the land in dispute, prior to the year 1843. On the other hand, they are entirely consistent with the legal title given in evidence by defendants.

6. When the evidence shows the occupancy of a house and garden only, the legal presumption is, that the occupant's claim of possession is restricted to the lines of that occupancy.

7. The dwelling by one man upon lot 42, and of another upon the Daniel David part of lot No. 43, is in law, under the undisputed evidence, a several occupancy, and the two can not be tacked together as one possession, much less can such occupancy be claimed to extend over and embrace the James Lewis part of lot No. 43, upon which there was neither residence nor cultivation.

8. The jury are not authorized under the evidence to join the three lots together, and the three Quicks together, for the purpose of finding a sufficient possession for plaintiff to entitle him to recover. Each lot must stand by itself and each Quick by himself.

9. If John B. Quick, on the 9th of May, 1826, had any title to convey to George Biddis, and if such conveyance should by the jury be believed to have been for the security of money; in the absence of testimony that Thomas Clark had notice thereof, he was a *bona fide* purchaser of F. A. L. Smith, without notice, and neither he nor these defendants can be affected thereby.

Judge ELWELL charged:

"In October, 1825, the title to the land in question was vested in John B. Quick, Warmoldus Cooper, and Abram Lefoy, Quick having one undivided fourth part, and Cooper and Lefoy three-fourths. There were three lots adjoining, certified to claimants under the compromise laws relating to the seventeen townships in Luzerne county. These lots are known here, one as the Miner lot, being No. 42, one as the Lewis lot, southerly half of No. 43, and these are the lands described in this ejectment, the former containing 383 acres and the latter 206 acres. The third lot is not embraced in this suit, but in order to understand the evidence, it is necessary to know that it is called the "Daniel David," or "Devee" lot, contains 208 acres, and is the north half of lot No. 43.

"On the 17th of October, 1825, John B. Quick, Warmoldus Cooper and Abram Lefoy conveyed these three lots to Isaac Frost and Josephus P. Loring, in trust, for the purposes therein mentioned; the object being to mine coal, etc., the interest in the land or association being divided into forty shares: John B. Quick having ten shares or one-fourth, W. Cooper three shares, Abram Lefoy two, and so on, naming the persons who held shares, and the number held by each. In case of the discontinuance or dissolution of the association, it was stipulated that the property should be conveyed to the *cestuis que trust*, according to the shares held by them respectively.

["Whether the association ever organized or transacted any business, we are not informed by the evidence.]

"On the 8th of May, 1826, John B. Quick conveyed by deed the one undivided fourth part of lot No. 42, and also the Daniel David part of No. 43, to George Biddis, for the consideration of \$6,000. And on the next day, May 9th, 1826, he conveyed the one-fourth part of the "Lewis" part of No. 43 to George Biddis, for the consideration of \$200.

"On the 3d of February, 1844, he made a deed to his son, the plaintiff, of the undivided three-fourths, or all his interest in lot No. 42 (Miner lot), and in Lewis part of No. 43.

"The title of George Biddis under the deed of May, 1826, became vested in Francis A. L. Smith, by deed of the executor

of Biddis, dated 16th of September, 1830, for the consideration of \$735. On the 21st of April, 1841, F. A. L. Smith, by deed, for the consideration of \$6,500, conveyed to Thomas Clark. The title of Thomas Clark by sundry conveyances is vested in the defendant.

“The legal title, so far as held by the trustees, Frost and Loring, became vested in the National Anthracite Coal Company before the institution of this suit, and is now held by the defendant.

“The plaintiff alleges that the deeds to George Biddis, although absolute on their face, were in fact merely security for money loaned, which has been repaid. He further claims that from 1825, down to the time of conveying to him, John B. Quick had been in the actual adverse possession of the property, and that he, the plaintiff, continued such adverse possession down to April, 1856, when he was dispossessed.

“An absolute deed may be shown by parol evidence to have been given merely as security for the repayment of money, and therefore, only a mortgage. But when this is allowed the evidence ought to be clear and unequivocal. The terms of the contract ought to be shown with such clearness as to enable a chancellor to determine how much money was to be secured. In the absence of evidence showing that the consideration named in the deed is less than the value of the property at the time, nothing but the most convincing proof should be allowed to prevail against the solemn deed of the party, duly executed, acknowledged, and placed upon the records.

“But whatever may be the strength of the evidence, it will not affect a *bona fide* purchaser without notice.

“Had the purchasers of the title from Biddis any notice that these deeds were for a different purpose from what appears on their face? Smith had no connection with the title until the date of his deed in September, 1830. From 1832 to 1840 it is assessed to him as the owner. He was in possession by his tenants, so far as regards the Biddis title; the assessments to Smith and his possession were entirely consistent with the deed, and the possession thus held was not constructive notice of any equity existing in John B. Quick. I therefore hold, and so instruct you, that the title of John B. Quick,

whatever it might have been, in the one-fourth part of the lands, was divested; that it became vested in Thomas Clark on the 21st of April, 1841, by the deed from Smith, the grantee of Biddis, and the plaintiff claiming by deed of subsequent date, acquired no title to this one-fourth. As to that, the verdict should be in favor of defendant.

“ We come now to the other branch of the case. We have seen that in 1828, the legal title to the three lots became vested in trustees. But the plaintiff alleges that as against the conveyance by which it became so vested, his vendor continued in the possession; that he ousted the trustees and his *co-cestuis que trust*, and that his own possession continuing that of his vendor, makes in him a perfect title under the statute of limitations.

[“ It would seem that the company proposed to be formed by the deed of trust did not go into active operations upon the premises as contemplated. Under these circumstances the shareholders would be entitled to a re-conveyance, and may be regarded as tenants in common.] But as against *bona fide* purchasers from the trustees, neither John B. Quick nor his grantee can hold the property, unless by title acquired under the statute of limitations.

“ In order to acquire title under the statute, there must be an ouster of the owner, and actual, visible, notorious, and hostile possession continued and uninterrupted for a period of twenty-one years. [If the jury shall find from the evidence that John B. Quick held from a period more than twenty-one years before April, 1856, and down to the time of conveying to the plaintiff in 1844, and that the plaintiff from that time leased the property to tenants as his own, and was in the exclusive enjoyment of the rents and profits claiming the right, and that open, notorious, and uninterrupted possession was thus held by them, they may presume an ouster of the co-tenants and *cestuis que trust* of John B. Quick, and to the extent of such possession the plaintiff may recover.]

“ Whether such acts have been done, and possession had, and to what extent, the jury will ascertain from the evidence. In order to aid you I will call your attention to all the evidence upon the subject.” (The court referred to the leases and the evidence upon the question of possession, and proceed.

ed): "In order to acquire title under the statute as already stated, the possession must not be broken. An entry by the owner, or an action of ejectment successfully prosecuted, would toll the statute. In November, 1845, the trustees, Frost and Loring, brought ejectment for the three lots mentioned, against Jacob R. Quick, another son of John B. Quick, and a man by the name of Norton, in which Jacob R. Quick confessed judgment. [If Jacob R. Quick, at the institution of the suit, was in possession of the lands in question, the judgment recovered against him, subsequently executed in 1856, by *habere facias* and putting out of the plaintiff, would have interrupted the statute, if it had not then run. Or, if Peter A. L. Quick appeared to defend the suit the same effect would be produced. It appears by the record that on the 1st of March, 1843, John B. Quick conveyed to Jacob R. Quick the David lot. If Jacob R. Quick was in possession of that lot only at the time of instituting the ejectment, and not of the others, then the suit did not interrupt the possession.

"You will determine from the evidence of Mr. McClintock and Jacob R. Quick and the papers in the suit, what was the character of the employment of Mr. McClintock. If it was, as stated by Jacob R. Quick, to be merely to ascertain whether or not the result of the suit could affect his interest, and he was told it would not, and he took no further part in the matter, the suit would not affect him.]

"We are requested by the counsel for defendant to instruct you upon certain written points which we will now read to you separately and answer.

"2. We affirm this point with this qualification. That after leasing the property for twenty-one years, as his own, accompanied with possession and exclusive perception of profits without being called to account, notice of his adverse claim may be presumed. This is not a presumption of law. It is raised only in case the jury believe it warranted by the evidence.

"4. Whether the assessments are consistent with the possession is for the jury. In 1826, John B. Quick & Co. are assessed with about the quantity of the three lots, and John B. Quick with twenty-five acres improved, and three hundred and seventy-five acres unimproved, and two houses. In 1827,

John B. Quick & Co. are assessed with the quantity. From 1828 to 1830, inclusive, George Biddis & Co. are assessed. From 1831 to 1843, inclusive (except 1841), Francis A. L. Smith is the person assessed, some of the years apparently with all of the land, and some of them with three hundred and eighty-six acres, probably the Miner lot. From September 16th, 1830, he held the Biddis title to one-fourth. From April 1st, 1835, he appears to have acknowledged himself as tenant of John B. Quick, having that day taken a lease for five years. From that time it would seem that assessment to him was not inconsistent with a claim of title by his landlord, John B. Quick.

“6. The proposition contained in this point is correct. But if the occupant claims the whole lot, and exercises over it such acts as owners generally do over their own property, his possession would not be limited to the spot occupied, but would be co-extensive with the boundaries of the lot.

“7. This point is not affirmed in all its parts. How the tenants held, of what they were tenants, how and what they occupied, are questions to be submitted to the jury. The property was occupied wholly by tenants to the extent that it was possessed and occupied. If the leases and occupancy of any tenant were of the specific lot, No. 42, and the David lot, or of either alone, and not of the Lewis part of lot No. 43, such possession could not be made available under the statute as to the latter lot. Neither could a separate lease of the David lot and occupancy under it, be considered in determining whether lot No. 42 had been held adversely for twenty-one years.

“8. We have instructed the jury in answer to the seventh point, as to separate tenants upon separate lots. We add that the possession to entitle a person to hold under the statute may be by himself or his tenants. The possession of successive tenants, if continuous, may be added together in making out the time.

“9. As answered in general charge.”

The verdict was for the plaintiff for three undivided fourth parts of lot No. 42—the Miner lot.

The defendants took a writ of error, and assigned for error

1. The admission of John B. Quick's deposition.

2. The admission of J. Wells's testimony to prove the agency of F. A. L. Smith, and the lease of Smith.

3. Rejecting the deposition of J. M. Cooper.

4 and 5. Rejecting the transfer of stock by J. B. Quick to A. Quackenbush.

6. Admitting the testimony of J. R. Quick as to the conversation of plaintiff with Mr. McClintock.

7-13. The portion of the charge included in brackets.

A. HAND and W. H. JESSUP, with whom was G. B. NICHOLSON, for plaintiff in error.

G. M. HARDING and J. W. MAYNARD, with whom was J. HANDLEY, for defendant in error.

The opinion of the court was delivered, May 11th, 1869, by AGNEW, J.

One objection to the release pinned to the deposition of John B. Quick was well founded. It was not identified as an exhibit accompanying the deposition. The deposition and all the other papers were fastened together in the usual way; but this paper was merely pinned between the leaves, leaving it without any evidence that it was attached by the justice who took the deposition. It is not referred to in the deposition or in any certificate, or by any indorsement upon it. No parol evidence was given to show that it was produced before the justice, or was returned with the deposition. In that it was in no wise identified. Under these circumstances, as a mere exhibit accompanying the deposition, it was not evidence, as is shown by the following cases: *Petriken v. Collier*, 7 W. & S. 392; *Dailey v. Green*, 3 Harris, 127; *Dixey v. Israel*, 4 Wash. C. C. R., 323; 3 Barr, 422. But this paper was a release of all warranties, covenants and liabilities contained in the deed from John B. Quick to Peter A. L. Quick. It fell within the words of the act of 18th March, 1775, as a deed concerning lands, tenements, hereditaments, and was therefore entitled to be proved or acknowledged and recorded. A general warranty is a real covenant descending with the title, and passes to the assigns by its express terms. It is often important to

a purchaser to see that the title is defended by covenant of warranty. It is a part of the deed, and evidently concerns the land which is conveyed by it. Perhaps it might be important the release should be recorded, to protect the warrantor against the suit of a subsequent purchaser without actual notice of the release. This release was duly executed and acknowledged nearly a month before the deposition was taken. It was evidence, therefore, under the recording acts, that John B. Quick had been released from all liability *quoad* the land in suit.

The second assignment of error can not prevail; the objection to the offer was general, and the evidence subsequently received took away the ground of objection, if any.

The third assignment has more substance. The defendant offered in evidence the deposition of John M. Cooper and a copy of the articles of association referred to in it, which was objected to, on the ground that there was no evidence of the loss or destruction of the original articles. Cooper states expressly that the original articles were sent, he thinks, several years ago, to some attorney in Wilkesbarre, and have since been lost; that diligent search has been made for them and they could not be found; that Exhibit B attached to the deposition is a *verbatim* copy of the articles of association. In the absence of any cross-examination to explain, or other evidence to disprove the statement, it is difficult to see why the proof of loss and search was insufficient. The testimony of E. B. Harvey, given afterward by defendant, certainly corroborates rather than contradicts Cooper's testimony. But resting on Cooper's testimony as the offer did, it seems to have been error to reject it. No objection was made to the proof of the existence of the original articles. The 4th and 5th errors follow that just considered. The 6th assignment must be sustained. The objection to the testimony of Jacob R. Quick as to the conversation between P. A. L. Quick and Mr. McClintock, was rested expressly on the ground that the question was leading in its form. It clearly was so, as it indicated just the answer the party desired. This is the rule, as to what are leading questions : *Selin v. Snyder*, 7 S. & R., 166; *Summers v. Wallace*, 9 Watts, 163. The form of the question was, "whether P. A. L. Quick asked McClintock if his rights would be in any manner affected by that suit, *and that Mc-*

Clintock replied that they would not, and that he might go home." The purpose here was to get McClintock's reply to P. A. L. Quick's question, and instead of asking what he said in reply, the answer to be made by McClintock is immediately embodied in the question, indicating at once the answer expected. The objection was made and the ruling excepted to, and we can not deny the party the benefit of it. The only other question that we need consider is that raised in the 9th, 11th, and 13th assignments of error, as to the evidence sufficient to prove an ouster between tenants in common. The pith of the judge's charge is, that from an open, notorious and uninterrupted possession of John B. Quick and P. A. L. Quick, through their tenants, for twenty-one years, claiming the whole in their own right, leasing the property to tenants as their own, and taking the rents and profits exclusively, the jury might infer an ouster of their co-tenants. This is the law as it has been held in this State since *Frederick v. Gray*, 10 S. & R., 182; *Mehaffy v. Dobbs*, 9 Watts, 377; *Law v. Patterson*, 1 W. & S., 184; *Bolton v. Hamilton*, 2 W. & S., 294; *Calhoun v. Cook*, 9 Barr, 226; *Keyser v. Evans*, 6 Casey, 507; *Rider v. Maul*, 10 Wright, 376. A mere reception of the profits and claim of the land will not alone prove an ouster. There must be positive acts or a line of conduct indicating an intention to exclude the co-tenants. This has been said in *Hart v. Gregg*, 10 Watts, 185; *Forward v. Deetz*, 8 Casey, 69; *Bennet v. Bullock*, 11 Id., 364; *Tulloch v. Worrall*, 13 Wright, 133.

In none has it been more strongly asserted than in *Hart v. Gregg*, but a *dictum* in that case, somewhat wider than was called for, was afterward criticised and qualified by Chief Justice Gibson, in *Bolton v. Hamilton*, 2 W. & S., 299, and *Calhoun v. Cook*, 9 Barr, 227. What is said by Justice Thompson in *Forward v. Deetz* had reference to the facts of that case, and was properly qualified by himself, in saying that it was not intended to assert there, that an ouster may not be presumed from great lapse of time and the circumstances. Every case must be judged of by its facts. It is therefore certainly the law that open, notorious and uninterrupted possession of the whole by a tenant in common for twenty-one years, claiming the whole land as his own, and taking the

whole profits exclusively to himself, is evidence from which a *jury may* draw the conclusion of an ouster and an adverse possession. The distinction is that it does not afford a *legal* presumption, which would entitle the court to withdraw the question from the jury, and instruct them that they *must* infer an ouster, but it constitutes a natural presumption, or is competent evidence, from which the jury *may* infer an ouster and adverse possession, if not successfully rebutted. But the question of fact must be determined by the jury, for it may appear from all the circumstances that the possession is not adverse, notwithstanding the long-continued reception of the profits. Every case depends on its own circumstances, as to the strength of the conviction it produces, and hence it must be left to the jury under a proper instruction, to determine whether the fiduciary character of the relation has been determined by a decisive act, or by a course of conduct bringing home notice to the party to be affected by it, of the change in the character of the possession. In the cases of *express* trust, or where there is a *direct confidence* created by the instrument, as between trustee and *cestui que trust*, landlord and tenant, mortgagor and mortgagee, etc., the evidence to show a denial of the relation, will always have to be stronger to produce conviction, than in those where the relation is less direct and confidential, as between co-tenants: *Rush v. Barr*, 1 Watts, 110; *Martin v. Jackson*, 3 Casey, 504; *McMasters v. Bell*, 2 Penna., 180; *Brandon v. Bannon*, 2 Wright, 63. Yet in all cases the rule is the same, to wit: that the relation must appear to have been severed by such positive acts, or continued conduct as tend to bring home notice to the party to be affected, of the change in the relation, and that the possession is adverse to him.

The remaining assignments of error need no special notice. They are not sustained. As a whole, the charge was fair and accurate, and the case was left to the jury in a very intelligible manner.

Judgment reversed and a venire facias de novo awarded.

CAMPBELL v. WEST & MATHIS.

(44 California 646. Supreme Court, 1872.)

¹ **Prescription—Ditch property.** Five years continuous possession of a ditch, open, notorious and exclusive, and known to the adverse party, gives title by prescription.

Appeal, District Court, Second Judicial District, County of Butte.

The ditch in controversy lies in Butte county, and takes the water of Butte Creek, near Neal's saw-mill, and extends down the banks of Butte Creek, and over the divide between little Butte Creek and Dry Creek, to Dry Creek; thence along Dry Creek, over the mountain, to St. Clair Flat, and thence along the foot of Table Mountain to Thompson's Flat. It was excavated over public lands, and crossed the northeast quarter of the southwest quarter, and the north half of the southeast quarter, and the southeast quarter of the southeast quarter of section twenty-three, and the northwest quarter of the northwest quarter of section twenty-five, township twenty north, range three east, Mount Diablo, base and meridian. These were the lands the plaintiff purchased from the United States. It was excavated, and the water of the creek appropriated in accordance with the local customs, and the decisions of the courts of this State, and the water was used for mining purposes. It cost \$20,000.

Judgment for defendants. Plaintiff appealed. The other facts appear in the opinion.

BURT & SEXTON, for appellant.

♦
HUNDLEY & MARTIN, for respondents.

By the Court, RHODES, J.:

This is an action to prevent the defendants from maintaining, and to cause to be abated as a nuisance, a water ditch which was constructed, and was and still is used, to convey water for mining purposes.

¹ Ante p. 196.

The ditch was constructed between 1856 and 1857, and all the right or title therein which was acquired by the person who constructed it is vested in the defendants. The plaintiff acquired the title to certain tracts of land over which the ditch runs, under two patents from the United States, which were issued to the plaintiff's grantor in 1860 and 1861, and a duplicate certificate and receipt issued by the receiver of the Land Office, at Marysville, to the plaintiff's grantor in 1864. The defendants pleaded, among other defenses, the statute of limitations. The action was commenced April 4th, 1870. The defendants had judgment.

The court found for the defendants on the issue of adverse possession, and although on some points there was a conflict in the evidence, there was sufficient evidence, if the court gave the greater credit to the testimony of the defendants, to justify the finding. That the use commenced and continued up to the commencement of the action under a claim of right, and that it was peaceable, without interruption, open, notorious, and exclusive, and that it was maintained with the knowledge of the plaintiff and his grantors after they acquired title, the evidence leaves but little doubt, and justified the court in finding the adverse possession—or prescription, as it is usually denominated, when the issue relates to an easement.

The other points need not be noticed, as the finding on that issue is decisive of the case.

Judgment and order affirmed.

SATERFIELD ET AL. V. RANDALL ET AL.

(44 Georgia, 576. Supreme Court, 1882).

Occupation from day to day, not essential. The court charged that if the land was chiefly valuable for timber and mining, its use for such purposes was sufficient as the basis of a prescriptive title, but added that such use "must be *continuous*, that is, from *day to day*, *month to month*, and *from year to year*": *Held*, error, upon the facts of the case.

The action was ejectment, in which defendant relied upon a prescriptive title, the defense being the statute of limitations, and was tried before Judge PARROTT of the Lumpkin Superior Court, at September Term, 1871.

Title was shown from the State down to plaintiff. For the defense, it was shown that the premises in dispute was a wild lot, not fit for cultivation, and that from time to time, defendant exercised ownership over it, by cutting wood and timber therefrom, and digging gold therefrom, claiming possession, though not living on the land, ever since he bought it in 1834, and took a bond for titles therefor from one claiming it as his, and paying him at least part of the promised price.

The court charged the jury, among other things, that if the land was not fit for cultivation, but was chiefly valuable for timber and mining, they could consider whether the use and occupation which defendant had enjoyed, was equivalent to such actual possession as would be the foundation of a prescription title, either by seven years' possession under color of title, or by twenty years' possession without title. [But such use and occupation must be continuous, that is, from day to day, month to month, and from year to year.]

The jury found for the plaintiff. Defendants' counsel moved for a new trial, upon the grounds that the verdict was contrary to the evidence, and the charge of the court (not repeated here), and because that part of said charge above, in brackets, was contrary to law. The court refused a new trial.

This is assigned as error.

WEIR BOYD, for plaintiffs in error.

H. P. BELL, for defendants.

Opinion by WARNER, Chief Justice.

This was an action of ejectment, to recover the possession of a tract of land in Lumpkin county. On the trial of the case, the defendant claimed the land under a prescriptive right to the possession of the land for seven years, under a color of title and claim of right. Whether the defendants' possession, under the evidence, was sufficient to protect him

under the law, was a question of fact for the jury; and if they had found a verdict for the defendants, we should not have been disposed to disturb it. But under the charge of the court, the jury could not well have done otherwise than have found a verdict for the plaintiff. The court charged the jury, "that if they believed from the evidence, that the lot of land was not adapted to agricultural cultivation, but was chiefly valuable for timber and mining purposes, then they could consider whether the use and occupation which defendants had enjoyed was equivalent to such actual possession as would be the foundation of a prescription title, either for seven years under color of title, or twenty years without title; but such use and occupation must be *continuous*, that is, from *day to day, month to month, and from year to year.*"

This charge of the court, in view of the evidence in the record, was error, and a new trial should have been granted.

Let the judgment of the Court below be reversed.

MOORE V. THOMPSON ET AL.

(69 North Carolina, 120. Supreme Court, 1873.)

Facts amounting to adverse possession. The quarrying of rock, burning lime, and cutting wood for a lime kiln, building sheds, etc., continued during seven years, amount to an adverse possession under the statute of limitations.

Notoriety of a mining possession. Such possession as will ripen into title must amount to notice of claim of ownership; and mining operations, or the working of a lime kiln are more likely to attract attention than the ordinary operations of a farm.

Appeal from the Superior Court of Henderson County.

This action was ejectment, brought before the new constitution took effect, and was tried before HENRY, J., upon the report of a referee. The plaintiff had judgment, and defendants appealed. The facts are stated in the opinion of the court.

MERRIMAN, FULLER & ASHE, for defendants.

McCORKLE & BAILEY, for plaintiff.

SETTLE, J.

The plaintiff claims title to the lands in controversy under a grant from the State, issued to John Miller, in 1834, and it is admitted that he must recover, unless the defendants who claim under a grant from the State issued to George and Ephraim Clayton in 1836, are protected by a peaceable, open, uninterrupted and adverse possession of seven years. The writ issued on the 10th of March, 1860, the facts (as found by the referee and stated in his award) are that in the month of January, 1853, the defendants put Winfield Fletcher in the possession of the premises in dispute, in order that he might test a vein of rock on the premises, and ascertain whether or not it was a lime vein, and if it proved to be lime, to work it; that in January, 1855, he built a shed, quarried rock, built a kiln, and cut wood to burn it on the land in dispute; that in the month of February, 1853, he burned the kiln, which yielded about five hundred bushels of lime, and having tested the quarry and ascertained it to be lime, he cut wood and quarried rock on the premises for another kiln during the following spring and summer, leaving his tools in his shed during his absence, until the fall of 1853, when he took a written lease from the Claytons, which had been promised in January, 1853, and erected permanent improvements, and that the defendants have been in possession ever since.

The authorities on this subject are collected and revised with care in *Loftin v. Cobb*, 1 Jones L. 406, and we deduce from them the principle that the possession which will ripen into a title must be indicated by such acts as are sufficient to notify mankind that the party in possession is claiming the land as his own, and must be so repeated as to show that they are done in the character of owner, and not of an occasional trespasser. The leading idea is that there shall be notice to the world, so that any one claiming adversely may have an opportunity to assert his title. The acts of ownership in this case were of a nature calculated to attract more than ordinary notice.

The discovery of a lime quarry and the working of it, like

mining operations, from the nature of things, would be discussed throughout the neighborhood, and attract more attention than the ordinary operations of the farm, and the acts set forth were so connected and continuous as to constitute uninterrupted possession in contemplation of law.

There is error.

Let judgment be entered here for defendants.

PER CURIAM:

Judgment reversed, and judgment for defendants.

COLVIN v. McCUNE.

(39 Iowa, 502. Supreme Court, 1874.)

Claim distinguished from color of title. To constitute a bar under the statute of limitations, it is not necessary that the party hold under color of title; it is sufficient if he hold under a claim of right.

Tax deed. A tax deed, though void on its face, may amount to color of title.

Facts amounting to adverse possession. The leasing of quarries and timber by the owner of adjoining land, and taking stone and timber from time to time, or permitting others so to do, for pay, during the statutory period, accompanied by the payment of taxes, all done under color of title and claim of right. *Held*, to amount to a continued adverse possession.

Appeal from the District Court of Johnson County.

The action was commenced in 1870 for the recovery of lots 1 and 3, section 3, township 81, range 5, in Johnson county. After answer to the petition had been filed, plaintiff, by leave, filed an amended petition in equity, setting up her right to the same property, averring that defendant claimed some right thereto, under some alleged tax title purchase, deed and foreclosure, all of which were void as the amended petition averred; it also averred the taking and selling of large quantities of stone from the premises, etc., and prayed an accounting.

The answer to the amended petition set up the tax title in defendant, and pleads the statute of limitations. Before judgment the plaintiff died and her heirs were substituted. After trial by the court, defendant had judgment, and the plaintiff appealed.

RUSH CLARK and W. C. GASTON, for appellant.

S. H. FAIRALL and BOAL & JACKSON, for appellee.

COLE, J.

There is no controversy but that the plaintiff's first husband entered the land sued for, and that by his death, and the subsequent death of their issue, she became the owner in fee of the government title. Nor is there any controversy as to the legal insufficiency of the tax sale, deed and foreclosure to pass a perfect legal title to the defendant. The whole case is, therefore, rested upon the single question of the statute of limitations.

On January, 1843, Casper Nick, who was the plaintiff's first husband, entered the land in controversy, and on his way home from the land office was drowned. Shortly after his death, and on July 4th, 1843, a child was born to him by the plaintiff, who was named Casper W. Nick. In 1846 the plaintiff was married to John Evans, who died in 1853, and by whom she had two children, both of whom died before this suit was brought. In 1857 the plaintiff was again married to Harvey C. Colvin, with whom she lived until her death, which was after this suit was commenced, and by whom she had two children, who have been substituted as plaintiffs herein. The plaintiff lived in Linn county, Iowa, some eight or ten miles from the land, from the date of its entry up to the fall of 1859, when she removed with her family, including Casper W. Nick, to Texas, where Casper died in the fall of 1861. She removed from Texas to Schuyler county, Illinois, in the spring of 1869, and resided there until her death.

The defendant's title and claims grow out of the following facts: In 1839, James Cavanagh bought of one King, and took possession of a "claim" to about five hundred acres of government land, which included that in controversy here, or

at least lot three. Cavanagh afterward entered most of the land embraced in said claim, and which adjoined the land in controversy; his farm was made on the land entered by him; the Cedar river runs between and forms one of the boundary lines of each of the lots one and three; upon the land in controversy are both stone quarries and timber. In 1843, and after the death of Casper Nick, some one representing his estate, widow or heir, leased the stone quarries to Duell & Holmes, for a term of ten years; they took possession under the lease, and worked the quarries more or less during their term. In 1849 Cavanagh purchased the lots at a tax sale for the taxes of 1846, and obtained his treasurer's tax deed therefor; he also purchased them at a subsequent sale for taxes, and obtained another deed, and in 1852 or 1853 he obtained a decree of foreclosure under his tax title; about 1855 Cavanagh established a ferry and built a ferry house on the land in question; and the house was occupied and the ferry operated for two or three years or more; some time afterward the ferry went into disuse, and after that, the time not being distinctly shown, the house was torn down or removed. In 1855 Cavanagh sold his farm and the land in controversy to R. L. Lucas, and conveyed the same to him, the former by warranty and the latter by quit-claim, and Lucas took possession at once. In 1860 Lucas sold all the property to Darius Baldwin, and conveyed to him in the same way, and Dennis Baldwin, a nephew and agent of the grantee, took possession from Lucas. In 1864 Darius Baldwin sold and conveyed all this property in the same manner to this defendant, John P. McCune, and he entered at once upon the possession.

The first point discussed is in respect to color of title. The counsel for appellant insist that the first tax deed is void on its face, and that it does not afford such color of title as will support the adverse possession requisite to constitute a bar under our statute of limitations. But we have held, that to constitute a bar under our statute by adverse possession, it is not necessary that the person holding the adverse possession should have taken and held under *color* of title; it is sufficient if such possession was taken and held under a *claim* of right: *Hamilton et al. v. Wright*, 30 Iowa, 480, and cases there cited; and Cavanagh, whose testimony was taken in this case by the plaintiff, testifies that "after I bought lots one and two for

taxes, and got my tax foreclosure, *I claimed that I owned them*, and I believe I paid the taxes on them until my sale to Lucas." The adverse possession, then, was taken and held after the premises were left by Duell & Holmes, in 1853, under a claim of title or ownership; and this, under the doctrine of the case above cited, was sufficient.

But if the tax deed was void on its face, it would afford color of title so that the statute would operate as a bar. This was so held by this court in *Douglass v. Tullock et al.*, 34 Iowa, 262, and cases there cited. That the defendant, and those under whom he claims, have taken and held possession under both claim of ownership and color of title, the testimony does not leave any room for doubt. See *Close v. Samm*, 27 Iowa, 509; Code of 1851, §§ 1239, 1240; Rev. of 1860, §§ 2268-9. The next point discussed relates to the fact of continued adverse possession for the requisite time. Upon this point, the testimony is not so direct, clear and positive as upon the facts showing color of title. But, in our view, the weight of the evidence supports the conclusion reached by the learned district judge, who tried the cause below. It is not our duty here to discuss and compare all the evidence introduced in the cause, and to set it forth, and weigh it in detail. We can only state briefly the leading facts whereon we can properly ground our conclusion. In 1853, when Duell & Holmes abandoned the quarries, Cavanagh was in possession of and cultivating his farm which adjoined the land in controversy—that is timber and stone land. He then assumed entire possession of this land, and claimed to own it. He cut wood and timber from it as he wanted it for use; he quarried stone for his own use, and others were allowed by him to quarry rock there, which they did, and paid him for; he established a ferry and built a house for his ferryman; he used the property as his own, and paid the taxes upon it regularly. After Lucas purchased, he took immediate possession of all the property, and continued its use, and paid the taxes, the same as was done by Cavanagh; and further, he sold the timber off twenty acres of land, and it was cut and carried away during Lucas' occupancy.

After the sale by Lucas to Darius Baldwin, the possession was taken by Dennis Baldwin, who was the relative agent

and tenant of the purchaser. During his occupancy, timber was cut upon the premises, and stone was quarried for use, and others were permitted to quarry stone by paying therefor, and did do so; the evidence does not disclose as free a use and sale of timber and stone during Baldwin's tenancy and occupancy as during the ownership and occupancy of Cavanagh, Lucas, and the defendant; but the difference is only in degree, which is, perhaps, fully accounted for by the fact that Dennis Baldwin was but a tenant, while the others were owners. He took possession for his principal under a purchase as owner of the land in dispute, and he used it for the same purpose and in the same manner, if not to the same extent, as the former occupants had done. He also paid the taxes regularly, unless, as he says, he may have failed one or two years, respecting which he is not certain. But there is nothing to indicate that there were or are any delinquent taxes, or that they were paid by plaintiff or others.

After this defendant took possession, which was immediately upon his purchase from Baldwin, it is conceded by appellant's counsel that he held by open and notorious adverse possession.

Upon the doctrine of *Booth & Graham v. Small & Small*, 25 Iowa, 177, we do not see any escape from the affirmance of this judgment, under the facts proved. It is there held that "possession of land is the holding of, and exclusive exercise of, dominion over it." It is evident that this is not and can not be uniform in every case, and that there may be degrees in the exclusiveness even of the exercise of ownership. The owner can not occupy literally the whole tract; he can not have an actual *pedis possessio* of all, nor hold it in the grasp of his hands. His possession must be indicated by other acts. The usual one is that of inclosure. But this can not always be done, yet he may hold the possession in fact of uninclosed land by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable, and acquire the profits it yields in its present condition. Such acts being continued and uninterrupted, will amount to actual possession; and if, under color of title or claim of right, will be adverse: *Langworthy v. Myers et al.*, 4 Iowa, 18; *Ewing v. Burnet*, 11 Peters, 41; *Brooks v*

Bruyn, 24 Ill. 372; *Wall v. Nelson*, 3 Littell, 398; *Williams v. Buchanan*, 1 Iredell's Law, 540; *Tredwell v. Reddick*, Id. 56; *West v. Lanier*, 9 Humph. 762; *Bynum v. Carter*, 4 Iredell's Law, 310; *Morrison v. Kelly*, 22 Ill. 624; *Ellicott v. Pearl*, 10 Pet. 413; *Dills v. Hubbard*, 21 Ill. 328.

As we view the evidence, the actual adverse possession, commenced after Duell & Holmes abandoned the possession, and in the year 1853, and continued down to the commencement of this action, in 1870. Under these facts, that the statute is a bar can not be doubted, in view of our former decisions, even after allowing the year for the minority of Casper W. Nick: See *Phares v. Walters*, 6 Iowa, 106; *Montgomery v. Chadwick*, 7 Iowa, 114; *Kilbourne v. Lockham*, 8 Iowa, 380; *Johnson v. Hopkins*, 19 Iowa, 49; *Campbell v. Long et al.*, 20 Iowa, 382.

Affirmed.

JACKSON ET AL. V. STOETZEL.

(87 Pennsylvania State, 302. Supreme Court, 1878.)

Seating mineral lands. Wild lands are usually seated either by residing on the land, or by cultivation, in such a manner as to indicate a permanent occupation of it, but mineral lands which are unsuited to a residence, and incapable of cultivation, may be seated by the owner or one who has color of title, if he derives a profit from them, by using them in the only way in which they can be used.

Seating by trespasser—Tax sale. To enable a trespasser to seat a tract by enjoyment of profits, a permanent use of the land is necessary.

¹ **Taking temporary supplies of coal.** A mere digging of coal in the winter, with an abandonment of the property during the rest of the season, would not be sufficient, and such an occupation will not invalidate the sale of land for taxes as unseated land.

Error to the Court of Common Pleas of Columbia County.

Ejectment by John A. Jackson and Elizabeth, his wife, in right of said wife; Charles D. Herron and Jane, his wife, in right of said wife; Charles J. Tower and Robert M. Cummings against Eli Stoetzel, for a tract of land in Conyngham township, Columbia county.

¹ Compare *Wilson v. Henry*, ante 152

The material facts are stated in the opinion of this court.

At the trial the plaintiff submitted the following points, to which the answer of the court, ELWELL, P. J., is appended.

7. That the occupancy of a tract of land unfit for residence and cultivation, by the erection of buildings thereon, and the opening of a coal mine, and the mining of coal, the construction of a road to the premises, and the sale of coal to the amount of, at least, a hundred tons per annum, to the public in the neighborhood, during a period of fifty years, covering the years for which the tax sales were made, is such a seating of the tract of land as would invalidate a sale for taxes; and also:

8. That, if the jury believe the evidence of John Kline, that he went on the land nearly fifty years ago, making a claim on it, began to take out coal, erected buildings thereon, continued regularly thereafter to mine coal, and maintained possession to about 1860, also paying all taxes on the land demanded of him, after which last date the land in dispute was occupied by the lessees of the defendant, then the land was not subject to a tax sale, and no title was acquired by the purchaser.

Ans. "If John Kline had been the owner of this property, if he had had any color of title to it, then I would hold that the character of the occupancy stated by him and the other witnesses, would be sufficient to the making of a seated tract; but, as I look upon the evidence, his entries from year to year, and time to time, were but so many repeated trespasses; he had no occupancy that would have given him a title under the statute of limitations, as against the Tower heirs. * * * And, although by the authority of 5 P. F. Smith in *Fellows & Co.*,¹ if Kline had been assessed with taxes, he might perhaps have been compelled to pay them—possibly, personally an assessment might have been collected—nevertheless, that of itself would not render the tract a seated tract."

The defendant among others, submitted the following point, which the court affirmed:

That the evidence of the plaintiffs upon the possession and use of the land of John Kline and others, is not sufficient to establish a seating of the land at any time, and particularly not during the years, and at the times, assessments were made on which the tax sales were had.

¹ *Lackawanna Co. v. Fales*, 55 Pa. St. 90.

The verdict was for defendant, and after judgment the plaintiffs took this writ; their sixth and seventh assignments of error being respectively to the above points.

JOHN G. FREEZE & A. J. DIETRICK, for plaintiffs in error.

GEORGE F. BAER & C. R. BUCKALEW, for defendant in error.

PAXSON, J.

This was an action of ejectment to recover the possession of four hundred and forty-one acres of land, known as the Ebenezer Branham tract. The plaintiffs showed that the legal title from the Commonwealth was vested in them. The defendant was in possession, and claimed title by virtue of three tax sales. The only material question in the case is, whether the land was unseated at the time of the tax sale in 1854. It was sold at that time for the taxes assessed for 1851 and 1852. The tract was assessed as unseated.

The plaintiffs called a number of witnesses for the purpose of showing that it was seated. The court below in answer to the 7th and 8th points of plaintiffs, and the first point of defendant, charged the jury that the evidence was not sufficient to seat the tract. This ruling forms the subject of the 6th and 7th assignments of error.

The facts testified to by the plaintiff's witnesses, are substantially as follows: About fifty years ago one John Kline entered upon the tract and opened a coal mine. About the same time he constructed a shanty as a shelter for the men. The vein proved faulty, and at this point was abandoned, as was also the shanty. The latter was afterwards destroyed. Some time subsequently, but how long the evidence does not disclose, Kline made another opening on the same tract, about three-quarters of a mile from the first one, and commenced taking out coal. Another log shanty 8x17, was put up as a shelter for the men. Later a second shanty was put up for sleeping in, 12x16, covered with boards, and the first shanty was used as a stable, where the evidence shows a single horse or mule was kept a portion of the time. Neither of the cabins was ever used as a residence; one of the witnesses says: "Nobody could live there the way the shanty was." No one ever lived on the tract. The men came there on Mon-

day and returned to their homes the last of the week. The coal that was taken out was exclusively for the farmers and neighbors; none of it was ever shipped to market. The highest amount taken in a year appears to have been about 100 tons. The opening was small; the neighboring farmers took out coal there, although the mine was originally opened by Kline, and was called Kline's mine. Kline, however, had no title, nor even a color of right. He makes no such claim in his testimony. He does not say that the first shanty was built "for an improvement, and to make an application," as well as for a shelter for his men. This was never followed up, and the shanty was abandoned soon after its erection, as has been before stated. After Kline quit working the mine, he leased it to several other parties successively, who appear to have worked it in the same manner and to the same extent. What rent he was to get does not appear. On one occasion he received \$15 as his share of the coal.

The mining was done mostly in the winter. Some work was done in the fall or late in the summer.

Are these facts sufficient to seat the tract? There are two modes by which wild lands are usually seated, viz.: 1. By residing on the land; and, 2. By cultivation in such manner as to indicate a permanent occupation of it. And residence or cultivation of the character indicated, even by an intruder, is sufficient. Nothing is better settled than this, that an entry upon an unseated tract of land by any one, whether as an intruder or under the title of owner, either for the purpose of residence or for cultivation, makes the tract seated and prevents a sale for taxes: *Biddle v. Noble*, 18 P. F. Smith 279; *Campbell v. Wilson*, 1 Watts, 504; *Sheffer v. McKabe*, 2 Id. 421; *Kennedy v. Daily*, 6 Id. 269; *Rosenberger v. Schull*, 7 Id. 390; *Mitchell v. Bratton*, 5 W. & S. 451; *Wallace v. Scott*, 7 Id. 248; *Wilson v. Watterson*, 4 Barr, 214; *Jackson v. Sasaman*, 5 Casey, 112; *Lackawanna Iron Co. v. Fales*, 5 P. F. Smith, 90; *Jackson v. Flesher*, 1 Grant, 459; *Greenough v. The Fulton Coal Co.*, 24 P. F. Smith, 486. In some instances land may be seated without either residence or cultivation. This must be so or some lands could never be seated, as they are unsuited to a residence and incapable of cultivation, yet possessing value for their mineral deposits. It has therefore been said, that where the owner derives a profit from the land,

it can not be said to be unseated. This principle appears to have been recognized in *Stokely v. Boner*, 10 S. & R. 254; *Harbeson v. Jack*, 2 Watts, 125; *Kennedy v. Daily*, 6 Id. 269. In the cases referred to, the word profits was evidently used as the equivalent for cultivation, as it was manifestly profits from cultivation that was in the mind of the court. In the later case of *Lackawanna Iron Co. v. Fales*, 5 P. F. Smith, 90, the jury were instructed by the late Judge Conyngham that "a tract may become seated without permanent residence, and without cultivation through the raising of grain and crops, either of which would clearly make it seated. Some tracts may be entirely unfitted for cultivation, or for a permanent dwelling place, and yet they may become seated by a personal use of them in the only way in which they can be used." This, with other portions of the charge, was assigned for error in this court and affirmed.

It is manifest this tract was not seated by either residence or cultivation. It would only be seated, if seated at all, by the acts of Kline, and the neighbors and farmers taking out a limited supply of coal for domestic purposes, for a series of years. It may be, that if the owner had used the land as it was used by Kline, it would have seated the tract. But to enable a mere trespasser to seat a tract by enjoyment of profits, a permanent use of the land is necessary. A mere digging of coal in the winter, with an abandonment of the property during the rest of the season, would not be sufficient. The entry of Kline each season was, as was well said by the learned judge below, merely repeated trespasses. There is nothing to show that he entered under color of title, or claim of ownership, and with a view to a permanent occupation of the property, which were held to be essential in the *Lackawanna Iron Co. v. Fales*, *supra*. Suppose Kline and the neighbors who took the coal, had resorted to the tract each winter for their supply of firewood; that Kline had erected a shanty for the choppers to sleep in, and to protect them from the rain, and had kept a few cords on hand for sale; can it be said that this act of trespass, however frequently repeated, would have seated the tract? If a tract is to be seated by such evidence as this, I am unable to see why wild land may not be seated, by burning charcoal on it each winter for fifty years,

or by a sugar camp in the spring, provided anything in the shape of a cabin is erected to keep off the rain. The distinction between the effect of acts by an owner and by an intruder, was clearly pointed out by the learned judge of the court below, in his answer to the defendant's point. He said: "If John Kline had been the owner, if he had had any color of title to it, then I would hold that the character of the occupancy stated by him and the other witnesses, would be sufficient to the making of a seated tract." This distinction is also recognized in *Lackawanna Iron Co. v. Fales*, where it was said of a trespasser by the court below, and affirmed here: "we say it must be the going on under color of title, with an evident claim of ownership, and a view to a permanent occupation of the property, and occupying and using it continuously in the way its capabilities render it apparently most proper, that will make it seated." There was nothing upon this tract to indicate its permanent use by any one. There were no operations of any kind carried on there during the greater part of the year. There were no general works; no colliery; no tenant houses—nothing but a hole in the ground, out of which the neighbors took coal, which they knew did not belong to them, and a miserable shanty, unfit for occupation as a residence, and which was used only as a shelter for the men at night for a portion of the year.

We think the court below was right in holding that the evidence was insufficient to seat the tract. The facts not being disputed, it was for the court to pass upon their effect. The remaining assignments need not be discussed. They disclose no error.

Judgment affirmed.

Chief Justice AGNEW filed a dissenting opinion.

NATIONAL MINING CO. v. POWERS.

(3 Montana 344. Supreme Court, 1879.)

Squatter on Patented Mill Site. In 1869 a mining company obtained a patent from the United States for a mill-site. In 1872 P. purchased of C. certain buildings standing on the patented ground and built a fence around the premises and occupied and improved the same, with the knowledge of the agent of the company, but without any objection on his part until 1876, when he asserted title and demanded rent. P. testified that she never knew until this time that her title to the premises was disputed, but had always claimed to be the owner thereof. The mining company did not know that P. made any such claim until 1876. *Held*, that P.'s possession was adverse to that of the company, and having been so for more than three years, the statutory period, her title had become perfect.

¹ **Evidence.** On the trial the company offered to prove that when C. sold the buildings to P. he told her that he claimed no interest in the ground, that the company owned the land, and that the buildings were erected by its permission. *Held*, that this evidence was properly excluded, because P. did not claim title to the ground through C., but claimed it by adverse possession.

Appeal from the District Court of Lewis and Clark Counties, Third Judicial District.

This cause was tried by a jury, WADE, C. J., presiding, and resulted in a verdict for defendant, and judgment thereon, from which plaintiff appealed.

CHUMASERO & CHADWICK, for appellant.

E. W. TOOLE, for respondent.

BLAKE, J.

The complaint alleges that the appellant on October 1, 1876, was seized in fee, and the owner of and entitled to the possession of certain lots of land which were within the boundaries of the appellant's mill-site; and that the respondents entered into the possession of the premises and unlawfully withhold the possession thereof from the appellant. The

¹ We know of no Limitation Act so short in time or as liberal, as that of Montana; and what is wanting in the Statute, to defeat vested rights, is supplied by this decision.

answer denies these allegations, and says that the respondents and their predecessors in interest have occupied and possessed the lots since 1865; and that they have occupied the same adversely to the appellant and all persons more than three years before the commencement of this action. The appellant's replication denied the averments of the answer.

Upon the trial the appellant introduced in evidence a patent from the United States to the appellant to said mill-site, which embraced the lots that were described in the complaint. The patent was dated October 27, 1869. In 1872 Mrs. Powers, one of the respondents, who was the real party in interest, purchased of Joseph Codling a dwelling-house, stable and chicken-house, which were on the land in controversy. The husband of Mrs. Powers was made a party defendant in this action, and is the respondent also. Mrs. Powers made a peaceable entry upon the premises as soon as she paid therefor, and afterward, in 1872, put a good and substantial fence on the land, and has improved and cultivated the same ever since, and occupied and used the buildings thereon. The appellant is a foreign corporation, which has a place of business in this Territory. During this period the agent and superintendent of the appellant knew that Mrs. Powers was living upon the premises and improving the same, and that she had built said fence, but never demanded any rent or asserted any title thereto until April, 1876. Upon the trial Mrs. Powers testified that she always claimed to be the owner of the premises, and never heard that her title was disputed by any person until September or October, 1876. The agent and superintendent of the appellant testified that he never heard that either of the respondents was claiming said land until April, 1876.

The court below entered judgment on the verdict of the jury for the respondents.

Before we consider the errors which are complained of by the appellant, we will refer to the statutes, which are applicable to the case, and are contained in the chapter relating to "Limitations." Cod. Sts. 514.

"Any peaceable entry upon real estate shall be deemed sufficient and valid as a claim unless an action be commenced by the plaintiff for possession within one year from the making

of such entry, or within three years from the time when the right to bring such action accrued." § 3.

"In every action for the recovery of real property or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law, and the occupation of the premises by another shall be deemed to have been under such legal title, unless it appear that such premises shall have been held and possessed adversely to such legal title for three years before the commencement of the action." § 4.

"When it shall appear that there has been an actual continued occupation of the premises under a claim of title, exclusive of any other right, but not founded upon any written instrument, or judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely." § 6.

"For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only: First, when it has been inclosed by a good and substantial fence. Second. When it has been usually cultivated or improved." § 7.

It appears from the transcript that Codling executed a bill of sale to Mrs. Powers of the dwelling-house, stable and chicken-house, but did not make a deed of the land in dispute. It does not appear that this instrument was delivered to either of the respondents, or accepted by them. The claim of Mrs. Powers to the tract of land which she inclosed by a fence, is not founded upon any written instrument, judgment or decree.

The appellant contends that the court erred in giving certain instructions, and refusing to give one, which the appellants asked to be given to the jury. We think that all the questions which have been discussed by counsel are determined by the interpretation of the statutes *supra*. The court below followed these statutory provisions, and made no modifications thereof, and therefore committed no error. Upon the matters of law that are involved in this action, the reports are full of decisions, which are based upon the statutes regulating the subject. Mr. Tyler gives the following rule: "Whenever the statute declares what shall constitute the possession ad-

verse, the question is settled by a reference to the statute, and the decisions of the courts, which have been made under it. But, when the statute is silent upon the subject, the question is settled by general principles which have been sanctioned and established by the courts." Tyler on Eject., 852.

Was the possession of Mrs. Powers adverse under the laws of this Territory? She made a peaceable entry upon the premises, inclosed the same by a fence in 1872, and annually cultivated and improved the same from 1872 until 1876. If her possession during this period was adverse to that of the appellant, she acquired a good title to the land which she actually occupied. The courts have held under similar statutes that adverse possession not only bars the remedy and extinguishes the right of the party having the true paper title, but vests a perfect title in the adverse holder: *Leffingwell v. Warren*, 2 Black, 599; *Meeks v. Vassault*, 3 Sawyer, 206; *Arrington v. Liscom*, 34 Cal. 365; *Cannon v. Stockmon*, 36 Id. 535; *Higg v. Mayo*, 39 Id. 262; *Morris v. De Celis*, 51 Id. 55; Angell on Lim. (5th ed.), Ch. 31.

In *Ellicott v. Pearl*, 10 Pet. 412, STORY J., remarks in the opinion that "the erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property." In *Livingston v. Peru I. Co.*, 9 Wend. 511, SAVAGE, C. J., says: "Where the person claiming to hold by possession has no written evidence of title, but claims by parol to be the owner, there must be an actual occupancy, a *pedis possessio*, a substantial inclosure by fence, sufficient for the protection of the crops." In *Humbert v. Trinity Church*, 24 Wend. 587, it is decided that where there is an actual occupation of land, an oral claim thereto is sufficient to sustain the defense of adverse possession. "Putting a fence, for example, around the land, or erecting buildings upon it, are constructive notice to the world:" *Poignard v. Smith*, 6 Pick. 172; Angell on Lim. (5th Ed.), § 383. While the statutes of the Territory, *supra*, control this matter, we have referred to these decisions to show that the legislative assembly recognized and adopted legal principles which had been established many years. We have also seen the effect of their application to facts, which are similar to those under consideration. Under the testi-

mony, it is clear that the possession of Mrs. Powers, after the inclosure of the land by her fence, was adverse more than three years before this action was commenced.

The appellant insists that the court erred in excluding the following evidence, which was offered during the trial: That Codling bought the buildings in 1871, but did not buy the land because it was owned by the appellant; that he sold the buildings to Mrs. Powers in 1872, and then told her that he claimed no interest in the ground and could only sell these improvements; and that he also told her that the appellant owned the land, and that the buildings had been erected by the permission of the appellant.

Does this testimony affect the character of the possession by Mrs. Powers? Does it tend to prove that she succeeded Codling as a tenant at sufferance of the appellant, if we assume that he sustained this relation? A review of the facts enables us to give to these questions satisfactory answers. We are acquainted with the rule that the declarations of a tenant in the possession of land may be given in evidence as a part of the *res gestæ* to qualify the possession; but before the introduction of this testimony, "it must be proved that the tenant was in possession at the time the proposed declarations were made." *Ellis v. Janes*, 10 Cal. 456. Codling did not deliver the possession of the land in controversy to Mrs. Powers, and there is no testimony that he was in the possession of the same when the foregoing statements were made. When Mrs. Powers constructed and maintained her fence, after she purchased the interest of Codling in the buildings, the appellant and all persons were notified that she was in the actual occupancy of the premises in dispute, and that she was asserting some right which might ripen into a perfect title, if she was not interrupted in a legal manner. Codling did not erect a fence, and sold none to Mrs. Powers. The fence was maintained by Mrs. Powers without any license or action on the part of the appellant, or its agents, and the relations of all the parties by virtue of the transactions between Codling and this respondent concerning the buildings, are of a different nature. The appellant stood by and saw Mrs. Powers do those acts without making any objection. We will assume that this testimony had been admitted, and that the

respondents knew that the appellant had received a patent to the land from the United States. Mr. Tyler, in his work on Ejectment, says: "Neither a deed nor any equivalent muniment is necessary where the possession is indicated by actual occupation, and any other evidence of an adverse claim exists.

* * * An oral claim of exclusive title, or any other circumstances by which the absolute owner of land is distinguished from the naked possessor, are equally admissible and may be equally satisfactory. * * * It has been expressly held, that neither fraud in obtaining the possession of land, nor knowledge on the part of the tenant that his claim is unfounded, wrongful and fraudulent, will excuse the negligence of the owner in not bringing his action within the prescribed period." In *Crary v. Goodman*, 22 N. Y. 170, SELDEN, J., says: "Under the statute of limitations the real owner has twenty years in which to learn the fact that another is in the actual possession of his land, and may justly be charged with *laches*, if within that time he fails to discover and to assert his rights." Under the laws of this Territory, the appellant had three years in which he was required to ascertain the facts relating to the possession of the premises by the respondents, and obtain a remedy for his wrongs. No legal excuse is offered in behalf of the appellant or its agents, for the *laches* or negligence appearing in this action. The testimony of Codling could not affect the legal rights of the appellant and respondents, and was properly rejected.

The appellant claims that the title of the respondents was not hostile in its inception. But the acts of Mrs. Powers, under the statutes of the Territory, *supra*, were of this character. She intended to hold the land which was inclosed by her fence, against the claim of all persons, and her possession was hostile or adverse to the rights of the true owner: Angell on Lim. (5th ed.), § 391; *Adams v. Burke*, 3 Sawyer, 415. The testimony of Mrs. Powers, that she always claimed the title to the premises, is uncontradicted.

Judgment affirmed.

1. Adverse possession by mining without deed calling for defined bounds, restricted to the *pedis possessio*: *Aiken v. Buck*, 1 Wend. 466; *Ege v. Medlar*, 82 Pa. St. 86.

2. Adverse use of water: *American Co. v. Bradford*, 27 Cal. 360; *Post*

WATER; *Union Co. v. Dangberg*, 2 Saw. 450; *Post* IRRIGATION; *Davis v. Gale*, 32 Cal. 26; *Post* DITCH.

3. Digging sand treated as adverse possession: *Ewing v. Burnet*, 11 Pet. 41. Same as to quarrying: *Jackson v. Olitz*, 8 Wend. 440; *Post* EJECTMENT. Same as to coal mining: *McEwen v. Den*, 24 How. 242.

4. Mining, after minerals reserved: *House v. Palmer*, 9 Ga. 447; *Post* RESERVATION; *Marvin v. Brewster Co.*, 55 N. Y. 538, 14 Am. R. 322; *Post* RESERVATION.

5. Mixed possession. Conversion by party in adverse possession: *Mather v. Trinity Church*, 3 S. & R. 509; *Post* TROVER.

6. Between tenants in common: *Van Valkenburg v. Huff*, 1 Nev. 142; *Post* LOCATION; *Huff v. McDonald*, 22 Ga. 131; *Post* TENANT IN COMMON; 420 *M. Co. v. Bullion Co.*, 3 Saw. 634; *Post* PATENT.

7. As affected by U. S. Mining Act of 1872: 420 *M. Co. v. Bullion Co.*, 9 Nev. 240; 1 M. R. 114.

8. Mining upon land, by a resident claiming as owner, distinguished from the temporary occupancy of land by trespassers to take off the timber: *Lackawanna Co. v. Fales*, 55 Pa. St. 90.

9. Iron mining without residence or enclosure, held a sufficient adverse possession: *West v. Lanier*, 9 Humph. 762; *Post* POSSESSION.

10. Where the boundaries of claims overlap, each claimant working within his admitted lines, the possession of neither extends constructively to the interfering ground in such manner as to create an adverse possession: *Maine Co. v. Boston Co.*, 37 Cal. 41; *Post* POSSESSION.

11. *Non user*, or failure to mine or search for minerals during the statutory period of limitation, does not operate to make the occupation of the surface owner adverse to the title of the mine owner, where the titles have been severed: *Smith v. Lloyd*, 9 Ex. 592; *Seaman v. Vawdrey*, 16 Ves. 390; *Post* RESERVATION.

12. See STATUTE OF LIMITATIONS.

THE ADAMS MINING CO. v. SENTER.

(26 Michigan 73. Supreme Court, 1872.)

Power of Mining Co. to buy timber—General agent. There is no lack of power in a mining company to buy timber, and a purchase of it by a general agent is within his powers; and a sale of it, made by him, will be upheld.

General powers of superintendent. The authority of mining superintendents, or general agents in charge of mines, will be recognized without proof, as covering all the ordinary local business of the concern; and persons dealing with them have a right, in the absence of notice to the contrary to assume they have such power.

One person acting as agent for two companies. When the same person is made agent of two mines in the same vicinity, and it becomes necessary for one to deal with the other, he must be presumed to have the same power to act for both that would be possessed if there were two agents acting separately, and may dispose of property in the same way. And such a double authority would dispense with such formalities as could not be complied with where one man acts for both companies.

Transfer of property from one company to another, when the same person is agent for both. Where one of such companies authorizes its supplies to be used for the benefit of the other, a third person may rely on the authority of such joint agent in transferring any property belonging to either, as sufficient to pass title, and no formal transfer from one company to the other would be necessary to protect a purchaser dealing with either. The agent will be treated as competent to bind both.

Authority of such agent. Where an agent is empowered to use the supplies of one company for another, he may use them as well in exchange for articles necessary to be purchased, as *in specie*. And where timber owned by one company, was used to obtain powder for the other, which could only be done by settling also an outstanding powder account, it was held within his discretion.

Sale of timber—Delivery—Measurement—Title. Where an amount of timber was identified and sold at a given price per foot, and put under the control, and subject to the direction of the purchaser, it was held the sale was complete; the measurement not being necessary in such case to pass title, and none but a constructive delivery being possible.

Sale—Subsequent notice. Such a sale could not be revoked by any subsequent notice.

Heard October 23. Decided October 29. Error to Houghton Circuit.

BALL & CHANDLER and A. RUSSELL, for plaintiff in error.

HUBBELL & CHADBOURNE, J. G. SUTHERLAND and G. V. N. LOTHROP, for defendant in

CAMPBELL, J.

Plaintiffs sued defendant for taking timber alleged to be their property. He claimed title as having purchased it from William Frue, the agent of the plaintiffs, and also of the South Pewabic Company, to apply in payment upon a bill of mining powder and fuse, which was due him from the latter company.

There is no dispute about the important facts in the case, which were in substance, so far as essential to the exceptions alleged in the cause, as follows:

Both companies were organized mining companies at Portage Lake, in the Upper Peninsula, mainly owned by the same parties in interest, and employing the same general agent, Captain Frue. In the spring of 1870, and for some months previous, work had been suspended on the Adams mine, to await developments on the same lode in the South Pewabic. The supplies of both companies were kept together, and Frue was authorized to use the Adams supplies for the other company in his discretion, debiting them, when wanted, to the South Pewabic. The Adams Company had on hand the timber in question—about 26,000 feet—a year or more before the transactions in controversy, and Frue had been directed in 1868 to dispose of it if he could. There was some dispute as to the precise character of his instructions at that time. The timber was not wanted for any purpose of the Adams mine. In the spring of 1870, the South Pewabic was short of powder and fuse, and had run up an unpaid bill with Senter of about \$5,000, and unless it was arranged, he was unwilling to furnish any more. Frue proposed to him, and it was finally agreed, that he should take this lumber at seventeen cents a foot. The bargain was closed, and a new account was afterward opened for the desired articles, which was not paid up before the company failed, or stopped operations, and is still unpaid.

Frue put the timber in charge of one Ames to take charge of it for the South Pewabic.

The timber was in rafts, and moored at the premises of the South Pewabic. He afterward was directed to take charge of it for Mr. Senter, and was employed by mutual consent to measure it. He removed it for defendant to the other side of the lake, Mr. Ball claiming to act for plaintiffs, objecting and claiming it to be their property.

The jury found for the defendant.

The questions presented can be best disposed of by combining such of them as are not distinct. Much of the controversy turns on the powers of Captain Frue, the mining agent. Both companies had their principal offices in Boston, and Elisha T. Loring, of Boston, was president of both, and Charles H. Palmer, of Pontiac, the only Michigan director in either company.

It was claimed that these corporations had no power to buy or deal in timber, and that, for this reason, there could be no agency in Frue to do what could not be done by his principals. But this is not to be supposed. It appears this timber was originally designed for use by the Adams Company, and whether it had been so designed or not, we are bound to know that, in mining operations as well as in auxiliary work connected with them, timber is indispensable for some purposes, and capable of use for many. It would require a very plain case to justify a court in holding, as a legal proposition, that any such corporation might not become lawfully possessed of such property; and we can not, in advance, and without some manifest necessity, assume that such cases are to be found.

The next question refers to the extent of Frue's authority, independent of specific and expressly granted powers. We are not satisfied that any testimony would be needed to show the extent of the ordinary powers of an agent in charge of such mine. The authority of such officers must, within the usual range of business at least, be recognized judicially, like that of bank cashiers, vessel captains, and other known agents. The mining law recognizes agents by name, as known representatives on whom process may be served. They are the persons who have charge personally of the local business at the mines, and are necessarily to be treated in law as general agents; to do all that is fairly within the scope of corporate business in conducting the operations in that locality. The

testimony of Mr. Palmer, which shows the usual range of such agencies, indicates no more than should be inferred. The business could not be conducted at all without a very wide discretionary power. There is no reason, and can be no legal principle, which will put the agent of a corporation on any different footing than the agent of an individual in regard to the same business. A general agent needs no instructions within the range of his duties, and any limitations on his usual powers would not bind others dealing with him, and not warned of the restrictions.

So far as any instructions from the corporation authorities are concerned, they would, as between the agent and his principals, govern his liability. There is no legal presumption as to the powers of the president of a mining company; but as Mr. Loring's acts have been assumed in this case to be authorized, they must be so considered in this court, and it is probable they were so in fact authorized, so far as they were material.

The question next arises, how far the double agency of Captain Frue affected his relations to his employers, and to third persons. It was claimed that upon the principle that a man can not contract with himself, and can not occupy positions involving a conflict of duties, all of his dealings whereby the property of one company was transferred to, or used for the other, should be held unlawful. There is no validity in such a proposition. The authority of agents may, where no law is violated, be as large as their employers choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every partnership involves such double relations. Every survey of boundaries by a surveyor jointly agreed upon, would come within similar difficulties. It is only where the agent has personal interests conflicting with those of his principal, that the law requires peculiar safeguards against his acts. There can be no presumption that the agent of two parties will deal unfairly with either. And when they both deliberately put him in charge of their separate concerns, and there is any likelihood that he may have to deal with the rights of both in the same transactions, instead of lessening his powers, it may become necessary to enlarge them far enough to dispense with such formalities as

one man would use with another, but which could not be possible for a single person to go through with alone.

When these two mining companies appointed Frue to act as their agent in charge of their respective mines, it is not supposable that either expected him to have less authority than if two agents had been chosen, one for each. And it would follow of necessity, that under such an appointment, if any case should arise in which the agent of one mine would have legitimate occasion to deal with the agent of another mine, within the usual range of agency business, the one agent occupying the place of two such agents, must have the same power to dispose of such matters, or else the mine must suffer. The common sense inference from such a double appointment would rather be, that if there should be any difference, it should be towards a more intimate relationship in business than where the agencies were separate. And in the present case the evidence shows such an intent, going beyond what would probably be usual in most cases.

One inevitable result must be, that by all persons not actually notified to the contrary, his disposal of any property in his hands, in such manner as mining agents usually act, will, and should be, assumed as lawful. Each company having given him power to act over its concerns, it will be impossible, by reason of that holding out, for any one to know on whose behalf he deals, or whether he has a right to deal, except from his own representations. The employers who put him in such a position, must be estopped from questioning the acts they have so plainly authorized and enabled him to do.

In the present case, the timber was subject to sale by the agent of any company that owned it. The Adams Mining Company had distinctly authorized their supplies to be used for the purposes of the South Pewabic. It was not necessary, in order to carry out such a purpose, that the title should first pass from one company to the other, in any formal way, or at all. The act of an agent representing them both, would be as effectual as their joint transfer to any third person purchasing. As between themselves, the only possible adjustment must be by a transfer of credits on account, or a deposit, or shifting of funds to the private account of the proper company.

If Captain Frue, in the exercise of his judgment, deter-

mined that it was necessary to adjust or secure an outstanding powder account, as the best means for obtaining further necessary supplies, we think it was within his agency to do it. And if he was authorized to use the supplies of the Adams Company for the South Pewabic, we see no reason for holding that such an appropriation would be less legitimate than if the timber had originally belonged to the latter company. It was a reasonable and fair use of discretion in the choice of means to reach what was essential to the mining business. If Mr. Senter had been informed of the whole facts, he would have been justified in relying on Frue's authority.

After the contract was made, Frue did all that was possible to effect a delivery. Such delivery must necessarily be constructive, and the agent in charge of the timber, having been instructed, and having undertaken, by the joint directions of Frue and Senter, to hold it for the latter, the delivery was complete. The whole property being identified and sold at a fixed price per foot, the process of ascertaining the amount was not essential to passing the title, as it might have been if less than the whole amount delivered was to be sold and separated by measurement. In that case, the measurement might be necessary to fix the identity of the property sold. But where all is sold, no such process is needed to pass title. The ascertainment of the price was a mere mathematical computation, involving no further action to bring the minds of the parties together.

Assuming that Mr. Ball, who acted on behalf of the plaintiff, had authority to overrule the action of Captain Frue, and that his notice was given to Senter himself, it was too late to affect his rights, when the sale was complete already.

These considerations dispose of all the errors assigned, and it will not be necessary to refer to them specifically. The judgment was correctly given, and must be *affirmed with costs*.

The other Justices concurred.

MASSEY V. DAVIES.

(2 Vesey Jr. 317. High Court of Chancery, England, 1794.)

Clandestine partnership. An agent can not have a clandestine partnership with a party supplying timber to the mine of his principal, and will be decreed to account for and pay over the profits of such proceedings.

Timber on hand at dissolution of partnership. Where timber had been purchased for a colliery, and after its purchase, but before its use, certain partners retired, and the other paid for and used the timber, such retiring partners have no interest in, and need not be made parties to, a suit against the vendor arising out of the sale.

Stanley Massey and John Stanley were, with other persons, joint owners of a colliery. Davies was their agent and manager. Before he became so, it was usual for the owners to allow the agent some emolument arising from supplying the colliery with candles and other articles, upon which he obtained a profit; but when Davies became agent, it was expressly stipulated that he should be paid by a given salary; which was at first £60 per annum, but was afterward increased to £80; and that was to be his sole profit. In June, 1790, a lot of timber was purchased at the price of £250 for the use of the colliery from Davison, as it appeared by his receipt and the books of the colliery. This timber, though supplied in June, was not applied to the use of the colliery till July, when Stanley Massey and John Stanley had become sole owners; and it was paid for by them. In 1791, another lot of timber was purchased from Davison, as it appeared in the same manner. It was afterward discovered that these lots of timber were supplied by Davison and Davies jointly, the latter being admitted into partnership in that concern; but it did not appear that they were partners in any other business. Upon this discovery, Davison and Davies brought an action for the price of the last lot of timber, which had not been paid for, and obtained judgment. Stanley Massey and the administrator, with the will annexed, of John Stanley, then filed a bill praying that the defendants, Davison and

Davies, might be declared entitled only to the prime costs of the timber without any profit, and might account for the profits already obtained, and be restrained from proceeding further in the action. When the answers came in the injunction was dissolved, and the money paid under the judgment.

The defense set up by Davies' answer was, that he entered into this concern with the express consent of Stanley Massey; but the evidence proved only that he had informed Stanley Massey that he had entered into that mode of dealing with a man at Liverpool. Davison did not live at Liverpool. Davison by his answer, denied all knowledge that Davies was not authorized by his employers to join him in the concern.

Two objections of form were made at the hearing; first, that the first lot of timber having been supplied before the plaintiffs became sole owners of the colliery, they had no right to bring this bill without the other partners; secondly, that a supplemental bill was necessary to charge the fact that the injunction had been dissolved and the money paid under the action.

It was also contended, that if the plaintiffs were entitled to any remedy, it was to damages at law.

May 12th. MASTER OF THE ROLLS (SIR RICHARD PEPPER ARDEN.) This cause stands for judgment, not from any difficulty that I had, but merely because I had not time when it was argued, to give my opinion in the manner I wished.

The case made, is not important in point of value; but in point of precedent and example it is very important; so much so, that I should be sorry if any doubt could be supposed to exist, that the plaintiffs have a right to demand any profit made by the defendant by a breach of trust in the employment, with which he was concerned in the colliery. The defendant does not deny that he ought not to have engaged in any such trade without the consent of the plaintiffs; and the defense set up is, that he was authorized by Stanley Massey to commence that mode of dealing with Davison, to supply the colliery on account of them, and to derive a profit from it. The counsel were aware that it was impossible to contend, that unless the defense set up was verified, this bill is not well founded. As to the two objections of form: I was struck with

the first; but I do not think, in this stage of the cause and under the circumstances, that it will avail.

It is true, upon the face of the bill it appears, that down to July others were concerned as partners; and it also appears that the sale was made in June. If, therefore, this timber had been supplied and paid for (for it is all paid for) by the other partners, as far as the bill seeks to call back any money paid in their own wrong, these two plaintiffs can not have the sole benefit. But it does not appear that, whatever was the case with regard to the time when it was supplied, it could be applied to the use of the colliery till after July; but the contrary appears. The whole benefit of it was applied after these two became the owners, and they paid for it. Besides, this objection ought to have come from the defendant himself. He has not said so, but his counsel have endeavored to fix this as money paid on account of all the partners. Unless there is evident proof that they have contributed, I shall set my face against that objection. Upon these proceedings I must take it for granted, the first money that was paid was out of the stock of the plaintiffs only.

The second objection is very important in point of precedent. It is insisted, that whatever the right of the plaintiffs was, they could not obtain it upon this bill, originally an injunction bill, without a supplemental bill charging a fact that has made, it is said, a material alteration since the bill was filed. It struck me that if this is the case, there must always be a supplemental bill in every case where a bill is filed to prevent the payment of money at law, and the injunction is dissolved and the money paid. It occurred to me, that the practice was not so. If upon the face of the bill the equity is merely this: that the defendant as agent shall not have profit out of a transaction between himself as agent, and his employer as principal in a particular concern; though the plaintiffs can not succeed in an action, yet the equity remains. Therefore, there is no reason to say, that because the defendants have recovered at law, that which upon the face of the bill they, or one of them at least, is not entitled to retain, a supplemental bill is necessary. It is a relief that arises out of the very relief prayed by the bill. The plaintiffs prayed more than they could have. They prayed an injunc-

tion to prevent the payment of the money. Therefore, there is an end of the objections of form.

Then I am sure, unless another objection, which was insisted on, can avail, that as to the merits of the case the counsel felt distressed to argue, that if the answer was not supported, an agent who was to have no emolument but a salary, could without consent contract with his employers to supply them with articles, which he was to supply as agent. But it was insisted that the plaintiffs were not in a situation to be entitled to recover it back by a bill in equity; that is, if a man in breach of trust charges to the person who employs him more than he ought to have charged, that the person so injured can not recover it, either by an action for money had and received, or by a bill in equity; but ought to recover damages in an action for breach of the agreement. It is clear, if a person makes any profit by being employed contrary to his trust, the employer has a right to call back that profit. *Lord Lonsdale v. Church*, 3 Bro. C. C. 41, was a very hard case. It was meant that the man should have interest when they first employed him, but being a public officer, making use of public money out at interest, I thought his employer had a right to that interest improperly made. It is admitted, that if a servant charges his master with more than he actually paid, the master may recover in an action, or bill, if a bill would lie at all; but it is contended it would not. How am I to prevent such frauds as these, but by giving the relief I am now called upon to give? Where a man undertakes to buy for me in the most beneficial manner what my colliery shall want, can it be possible that I can trust him to sell those articles to me himself? The clearest evidence is necessary to show consent. It is opening a door to a monstrous fraud. I know there are cases in which that authority has been given. There are patent offices—which I hope, when they expire, will never be renewed—where the parties have a right to supply articles to public offices, and charge so much per cent. upon what they pay for those articles. That is an improvident grant and emolument, but it is not concealed. Such bargains will not be made in future. But these plaintiffs say they have found out that when the agent pretended to buy from Davison, he bought from Davison and himself; and they de-

sire that he shall retain nothing but the prime cost. Has any such consent, as is alleged, been proved? He says Stanley Massey gave him authority not only to commence as timber merchant, but to supply the colliery with such articles as he might as a timber merchant. This is in the answer, but so far from being proved, all he can prove by all the conversations prior to and after his discharge, is that Stanley Massey did admit that he had given him leave to enter into the timber concern with a man at Liverpool—not with Davison, the person who supplied the colliery; and that Stanley Massey denies.

There ought to have been the strongest evidence of consent. But what is much stronger, and what without evidence I should have held *prima facie* evidence against the defendant to throw the proof upon him, is the manner in which it is charged. Davison was the man in the habit of supplying the colliery. He takes this man into partnership. It does not appear that he had any other concern with Davison than in the articles he supplied to the colliery. It was entered in Davison's name only; the other was studiously concealed, and the voucher was a receipt by Davison only as for timber supplied by him only. Is it possible to believe, that if he had the authority he represents, he would have had any scruple of avowing the part he took in the business? It is said he could not give the receipt, because he was the man who paid the money; but he might. If Davison took it for his partner, why not say received for himself and Davies? So the other in the books is put down as bought from Davison only. But when it was found out, then the agent delivers a bill with his own name in it. He says he had license to sell timber to them if he thought fit; that he was loth to do it on account of his delicate situation; and mentions two men who applied to him and told him timber was wanted for the colliery, and says he sent them into Wales; that they afterward told him they could get none there; and then they asked whether he and Davison had not some, and whether they could not let them have it. He agreed; but said it must be at sixteen pence a foot; and he desired when they were going to value it that they would be sure not to put a greater value on it than it ought to bear. They only say they valued it at a fair price.

There is no imputation upon the price as between a timber merchant and a person buying from him. Am I sure he would not let them fix the price higher than that at which he would have purchased from any one else? He has secretly gone into partnership, and bought from his partner and himself timber, which he has supplied to his employers, and he has made a profit: that is made in breach of his trust, and must be refunded from his pocket.

Davison denies that he had any knowledge that the agent was not authorized by his employers to join with him; therefore, as between him and the owners, I do not think I can hold him answerable for any profit he has made. I suspect a little that he had some reason for admitting Davies, because he was the agent of the colliery; for there seems to be no other reason; and I know it is a common practice for servants to be fed by tradesmen for the sake of their master's custom. Yet upon the face of this answer, I can not, nor is it much pressed that I should, hold that Davison knew Davies was acting contrary to his trust; otherwise I would certainly hold Davison bound; for in the case of a servant, not only the servant acting contrary to his trust, but a man who, knowing the servant was guilty of a breach of trust, entered into the transaction with him, would be answerable. But Davison must be held to have completely denied all knowledge of any such breach of trust. It has been urged that this is contrary to the positive answer of Davies. I do not like to suspect men of swearing falsely; but what is a strong corroboration is, that if he really had this conversation with Stanley Massey, why did he not file a bill of discovery to ask him about it? He has not dared to do that. It is said he is not so well able to file a bill as the plaintiffs; but where the whole cause turned upon that, he would not have scrupled to do it if there had been any foundation for it. Therefore, as to all the profit made by Davies, he is liable to refund. As to Davison, the bill must be dismissed with costs; but he must undertake, that all their books shall be produced, otherwise I will not dismiss it with costs.

By consent it was ordered that sworn copies should be supplied, with liberty to compare them with the books.

BEAUMONT V. BOULTBEE.¹

(5 Vesey Jr. 485. High Court of Chancery, Eng., A. D. 1800.)

Steward taking lease. The steward of an estate taking a mining lease from his principal, his character as agent accompanying him as tenant, deprives him of the benefit of an objection that might be competent to another person, as to delay or neglect of the plaintiff in making a demand upon the defendant for the excess of coal taken out under his lease.

Account—Involving fraud. In this case a general account was decreed against the tenant, who was also agent, with respect to fraud, concealment and breach of trust.

Sir George Beaumont, Bart., having in 1757 employed Joseph Boulton, the elder, to receive his rents and manage his estates in the county of Leicester, at a salary of £20 a year, in 1760 granted him a lease of a colliery and a fire-engine, within the manors, etc., of Coleorton, Thringston, Worthington and Newbold, part of the said estates, for twenty-one years; reserving the yearly rent of £140 with a covenant on the part of the lessee that he would not get more than 10,000 loads of coal from said colliery in any one year during the term. It was agreed at the same time, that the actual rent to be paid should be £200 a year; and the lessee accordingly executed a bond for the payment of £60 a year, in addition to the reserved rent of £140.

By a memorandum in writing, executed by Sir George Beaumont, on the 13th of March, 1761, it was declared that notwithstanding the covenant in the lease, the lessee, his executors, etc., might get more than 10,000 loads of coal in any one year, so as the quantity should not exceed 10,000 loads one year with another during the term, and they should not take more than 20,000 loads in the two last years of the term.

About the same time that the lease of the colliery was granted, Sir George Beaumont also granted to Boulton a lease of a farm, part of the same estate, for twenty-one years, at the yearly rent of £305. He also rented some cottages, and the Spring Wood in Coleorton Wood, paying to Sir George Beaumont for the former £30 a year, for the latter £15 a year.

¹ See this litigation carried through several years in the next two cases, same title.

Sir George Beaumont died in 1762, leaving a son, Sir George Howland Beaumont, Bart., then aged six years, his heir-at-law, and tenant in tail under a settlement of the Leicestershire estate. Boulton continued in the management of the estate; and he and his son worked the colliery till the expiration of the term in August, 1781, when the father applied for a new lease; but Sir George H. Beaumont being abroad, and Thomas Bridge, his principal agent, declining to enter into any agreement for that purpose, Boulton, in 1782 or 1783, without authority, removed the engine, and erected an engine in Coleorton Field, at some distance from the former work, and began to work that colliery, and continued to work the old one.

Sir George H. Beaumont returned to England in 1784, and being informed of the application, refused to grant a new lease.

In May, 1784, Boulton, the son, on behalf of his father, delivered to Bridge a proposal containing the terms on which he was willing to work the colliery. That proposal stated that Boulton had paid in cash and materials for erecting a new fire-engine and planting a new colliery in Coleorton Field, £1,317 13s.; that he is debtor to Sir George Beaumont for materials taken from the old engine, £412 1s.; and that bills yet unpaid for altering a stable into a dwelling-house and erecting a new stabling, would come to £100. These sums, amounting in the whole to £1,829 14s., it was proposed in case Sir George Beaumont should not choose to grant a lease for twenty-one years, should be secured to Boulton in something like the following manner: If he holds the colliery but three years, Sir George Beaumont to reimburse him the whole £1,829 14s., in consideration of the trouble he has been at in planting the work. If Sir George Beaumont shall at any future time before the expiration of twenty-one years, take the colliery into hand, or set it to any body else, then Boulton, after the expiration of the first three years to abate £70 per annum out of the £1,829 14s. for every year he shall hold it. If he holds it the twenty-one years, Sir George Beaumont then to pay for the materials only by appraisement; Boulton agrees to pay for every load of coals one-twelfth of the money they shall be sold for as far as 6,000, and one-eighth for

every load above 6,000 loads, in one year, and £50 per annum for the lower field work at Newbold, so long as that can be carried on to advantage.

This proposal was altered by Bridge by substituting 5,000 loads instead of 6,000, as the quantity upon which Boulton should pay a twelfth only of the produce instead of an eighth. He stated that Sir George Beaumont considered the proposal so altered as proper, except, that the reduction of £70 a year for the use of the engine should take place from the commencement of the term, instead of the end of the first three years. This being opposed by Boulton, and insisted on by Sir George Beaumont, produced some correspondence. No lease, however, was executed; but the Boultons continued to work both the colliery newly opened in Coleorton Field, and the old colliery at Newbold, which they represented as nearly exhausted; charging themselves according to the proposal with a rent of only £50 a year for the latter, and for the new colliery with a mine rent of 1s. a load generally, and sometimes 1s. 6d.

Boulton, the father, also, after the expiration of the lease of the farm, continued in possession thereof, and also of the cottages and Spring Wood, paying the same rent as he had paid to Sir George Beaumont. In 1790 Boulton, the father, died, having made his will, and appointed his son executor, who succeeded him in the management of Sir George H. Beaumont's estate, and continued to work the old colliery till it was exhausted in 1792, and the new one till September, 1797, when Sir George H. Beaumont discharged him from being his steward, and turned him out of possession of the colliery, farm, and other premises.

In 1798, the bill was filed by Sir George H. Beaumont against Boulton, the son, praying an account of the value of the coals got by the defendant's father under the lease of the 1st of August, 1760, more than 10,000 loads in each year; also that the defendant may come to an account with the plaintiff for all transactions between the defendant's father, the defendant and the plaintiff, from 1781; or if the court shall be of opinion that the account ought not to be carried back so far, and that the accounts passed by Thomas Bridge on behalf of the plaintiff from that time ought to be consid-

ered as settled accounts, that the plaintiff may be at liberty to surcharge and falsify, etc.; the plaintiff offering to make an allowance to the defendant for the value of the fire-engine at the time he quitted possession of the colliery in Coleorton Field, upon being allowed a fair rent upon the produce of the said colliery for the time aforesaid, according to the ordinary rate at which collieries under similar circumstances have been let.

The bill stated that the lease had been obtained at an undervalue, through the misrepresentation of Boulton, and charged that Bridge, from a confidence in the defendant and his father, did not investigate their accounts, or require any vouchers; that the accounts passed by him contained many false charges, errors and omissions; that the old colliery at Newbold was of much greater yearly value than £50; that no agreement was entered into according to the proposal; that the defendant and his father did not charge themselves with a mine rent agreeably to the proposal, namely, with a twelfth part of the produce; that a much greater quantity of coal was got, and sold at much higher prices than appear from the accounts; that they had fallen timber and made bricks, which they applied to their own use, without account as to the latter, and as to the former accounting only at the rate of 1s. per foot; claiming the right to fall timber in Coleorton Wood, proper to be fallen, and to take it at that rate, and the top lop and bark, as a further compensation for their trouble as stewards; the bill stating as to that, that the salary was increased in 1792 to £50 a year, on condition that the defendant should not fall timber or take any benefit from the timber fallen.

The defendant, by his answer, admitted that in many years of the term his father got from the colliery a much larger quantity than 10,000 loads, paying only the rent of £200 a year; but he stated that the circumstances were fully known and explained to the plaintiff so long ago as 1779; and he and Bridge acquiesced in the reasons given by the defendant's father. He further stated, that soon after the commencement of the lease, an estate called Rotten Row, and the manor of Thringston, adjoining the plaintiff's estate, was held forth to sale. That estate was supposed to contain valuable mines of

coal, which might at a future time be worked in competition with the plaintiff's colliery. The price demanded was £2,000, though it produced a rent of no more than £10 a year. The defendant's father proposed that it should be purchased for the plaintiff's benefit; but that proposal being refused, the defendant's father in 1764, purchased it for his own use for £1,600. In 1766 the defendant's father purchased from Edward Dawson, whose lands adjoined the plaintiff's colliery, and were intermixed with his lands, the liberty of getting the nether coal under his land, for £200; and in 1772 he made a similar purchase from John Cotton at the rate of £30 an acre, amounting to £213 7s. 6d.; those lands being also adjoining the plaintiff's colliery, and intermixed with the plaintiff's land. He stated that his father was under the necessity of purchasing the coals under Dawson's and Cotton's lands, as without it the coal on the plaintiff's estate could not continue to be got to the best advantage; and in consequence of those purchases he got from the lands of Dawson and Cotton large quantities of coals, which were stacked upon the plaintiff's land, and mixed with the coal from his colliery; and the defendant and his father could not distinguish how much of the coal was got from the plaintiff's land, and how much from the lands of Dawson and Cotton; and down to the expiration of the lease, his father got, in the whole, including the coal got from the lands of Dawson and Cotton, 282,188 loads, being 42,188 loads more than at the rate of 10,000 loads a year.

The explanation alluded to by the answer, as to the excess of the coal got beyond the quantity stipulated, passed in the course of a correspondence between the defendant's father and Bridge in 1779 and 1780. Bridge, desiring an account of that excess, Boulton, the elder, sent him an account of the quantity of coal got by him, and also the amount of the extra expenses he had been at, in the said purchases, and in building a new fire-engine; with interest upon those disbursements. Bridge in reply asking, what he thinks may be reasonable to pay for the coals got above what were allowed by the lease, and desiring an explanation as to the other articles. Boulton by a letter dated the 18th of December, 1780, gives the following answer to his inquiries:

"I put down the quantity of coals got in the three

years before the commencement of my lease, that you might know how many loads had been got in the whole, since I entered upon the work; I must confess, that as I found the work in the most deplorable state, and had great trouble and expense in bringing it into tolerable working condition, I was in hopes that the 6,200, which those three years produced less than 30,000, might be deducted from the quantity I had got more than stipulated by lease; but if that appears to you unreasonable, I shall say no more about it. The most reasonable and regular mode of payment would undoubtedly be an additional year's rent of £150 for every 10,000 loads, which exceeds my quantity; but out of that money we must indisputably deduct the £413 7s. 6d. paid to Dawson and Cotton for their coal; because while that was getting, Sir George's was not. The reason why I take the value of the new engine is this: seventeen years ago (owing to the rottenness of Sir George's engine pit-shaft, which at that time ran in and drowned the work) I was obliged to erect a new one at the expense of £1,500; the interest of which since that time amounts to a very considerable sum, beside the decrease in its value, whenever it comes to be disposed of. The year after this, namely sixteen years ago, I gave Mr. Busby £1,600 for the Rotten Row and manor of Thringston, which undoubtedly ought to have been Sir George's purchase, and not mine, as his deep coal adjoining to it can never be got to advantage without it. From this purchase I have received no more than about £10 per annum. These circumstances and expenses, when duly weighed and considered by you, I make no doubt, will appear amply sufficient of themselves, exclusive of the £413 as above, to balance the profit of 48,000 loads of coal. I shall be happy to hear as soon as convenient, that my arguments appear to you conclusive."

He then expresses his wish that his whole conduct in Sir George Beaumont's affairs should appear upright and honest.

The answer insisted that as no claim was afterward made in respect of the excess of coal got beyond the stipulated quantity, there is no pretense for the plaintiff's now setting up any demand in respect of the said coal, or in any manner touching the said lease.

The defendant admitted that considerable quantities of coal

had been got from the old colliery at Newbold since the expiration of the lease; alleging that it had turned out better than was expected. He admitted that that colliery was in 1790 assessed to the land tax and poor's rate as of the yearly value of £220; and that his appeal from that rate was dismissed. The defendant also admitted having cut timber and made bricks. He insisted upon the terms contained in the proposals, as having been acceded to, with the alterations proposed by Bridge, though no agreement was actually executed.

The cause having been argued at great length by the Attorney-general (Sir John Mitford) and Mr. Romilly, for the plaintiff, and Mr. Mansfield and Mr. Hart, for the defendant, stood a short time for judgment. The plaintiff consented to take the rent of the Newbold colliery at £220 a year.

July 15th. LORD CHANCELLOR (LOUGHBOROUGH). There is no doubt as to the decree in this cause, except as to the claim set up by the plaintiff to an account of the quantity of coal got beyond the 10,000 loads in each year, the quantity stipulated by the lease: the lease to the defendant at £50 a year is so apparently under the actual value; when it was his duty fairly to represent the case, at least, he represented it so low that it was hardly worth anything; representing it to be a worked out colliery, and as a favor to Sir George Beaumont. He ran no risk. He was not bound to be at any expense. The fair value of the coal to be got out ought to have been the measure of it. The plaintiff seems to be contented to take it at £220 a year. Therefore, it is unnecessary to enter into the circumstances of the defendant's conduct in that instance, which certainly affords matter of gross and very particular charge against him. As to the other matters, they are trifling. Mr. Boulton was certainly very undeserving the confidence, which the defendant states was always placed in him and his father. He must account for the wood and for the bricks made.

The material question is as to the excess of coal got beyond the stipulated quantity. The defense as to that rests upon the length of time and the neglect of the plaintiff in not making the demand at an earlier period. With regard to the neglect, in many cases that will have considerable effect, but I do not know a possible case in which a confidential agent and

steward can impute neglect to his employer, for it is his duty to render an account, and a fair account, to his principal, and distinctly to apprise him of the whole right he has. It is not for him to say that a person has been guilty of neglect, whose negligence it was his duty to guard against with regard to his transactions with all persons, but particularly with regard to himself. As to the colliery, of which Boulton, as steward, obtained a lease, it is obvious Sir George Beaumont was not instructed, as he ought to have been, by any person acquainted with the subject, as to the nature of that engagement, which the owner of a colliery enters into with the tenant. The allowance to be made for overgetting the coal can not with any justice to the landlord be postponed to the end of the lease. It is very fair that the deficiency of one year should be compensated by the excess of another; but nothing can be more detrimental to the landlord than to postpone that settlement to the end of the lease, which Boulton has contrived with regard to his employer, as landlord, and himself, as tenant. Another circumstance was omitted, which never is omitted to be provided for in an engagement for the management of a colliery, viz: an engagement not to communicate the level of that colliery to a neighboring colliery. That he has done with regard to two neighboring coal owners. That act was in itself contrary to his duty as steward. Suppose he had been only superintendent to the plaintiff; he would have taken care not to communicate the level to the neighboring coal owners. Every person acquainted with the subject at all, knows how very valuable an object the communication of the level is. That neighboring coal which can not be got without the level, lies there, and the owner of the coal in which the level is, has always the advantage of taking that coal at much less value than any other person could get it.

At the close of the lease Mr. Bridge writes, with apparently great ignorance of the subject, from the style of the letter that appears, stating that he was informed, Boulton had got more coal than he was entitled to, and carelessly desiring an account of what he had got more than he was entitled to. The answer contains no information. It was only calculated to draw more inquiry from Bridge, and to sound a little, whether Bridge knew anything of the subject; on the other

side are three or four articles, explaining nothing, stating nothing, demanding nothing. From that exhibition it was impossible for Bridge to be possessed in any degree of that species of information he had desired, in order that he might advise the plaintiff as to the settlement of that account, and the future management of the coal, and putting it in some train under a new lease. Consequently, Bridge desires an explanation; and the explanation Boulton gives is very singular indeed. The terms of this letter are as dexterously contrived, as it is possible for a very ingenious man, in order to be answerable for nothing, to have an opportunity of advancing or retreating upon any of the hints he had given, and upon the whole, exceedingly to alarm Bridge as to the consequences of coming to a strict and rigid settlement of accounts. A more extravagant and absurd demand could not be suggested than that made by Boulton upon the first question. As to the next question he makes a very modest proposal of an additional year's rent of £150 for every 10,000 loads of coal exceeding the quantity stipulated; a proposal ridiculous and absurd to any person at all acquainted with the subject. But Bridge was perfectly ignorant of the subject, and it did not strike him as it must every other person, that an additional rent upon every 10,000 loads of coal was altogether absurd. He then proceeds to claim a deduction of the money paid to Dawson and Cotton, for their coal; assigning the reason, "because while that was getting, Sir George's was not." Instead of deducting, money ought to have been paid to the plaintiff for Dawson and Cotton's coal being got by his level.

Then as to the new engine; was that sort of demand ever made, because he, without any bargain made, erected a new engine, decreasing in value, he having had the benefit of it? With regard to that demand, which he states as to the purchase of the Rotten Row and manor of Thringston for £1,600, it is fair to state, that that sum of £1,600 should go in compensation of a considerable part of the demand, if not to the whole extent; but it is only upon the ground of the plaintiff having had the benefit of it that it can be set off against his demand for the coal. The conclusion that Bridge seems to have drawn is, that it would be a bad account for the plaintiff to demand. Upon a calculation it was clear, that

if all the counter demands were allowed, the balance of the account would be against the plaintiff; but that is only upon the supposition of his having acted for the benefit of the plaintiff; acquiring rights, that would be a benefit to the plaintiff, and little to him. As to the £1,600 laid out in the purchase, Boulton receiving only £10 a year, it was handsomely done. The length of time weighs here less than in any case. The account can be taken now as well as at any time. The question is not merely between landlord and tenant, but between persons, in one of whom, as the answer states, the most implicit confidence was placed by the other, to receive the whole rents of this estate; and at the same time letting him a lease of part of it, which lease he has no right to defend, as the answer states it, as any other person may defend it. He can not divest himself of the character of steward. Every other tenant is under the control of the steward: but his duty as steward accompanies him in his situation as tenant, and in the bargain he makes in that character. I should be very sorry to deny that the gross abuse of that unlimited confidence placed in the defendant and his father, would afford a sufficient ground in this case; but I have no occasion to carry it so high, and not to give him the benefit of the length of time, from his conduct; for upon this letter he admits the plaintiff's right; he admits the coal he got, and states as a compensation the benefit of the purchase. He has a right to set off that purchase against the demand; but he has continued to possess the purchased estate. Upon the foundation of that letter there is a demand; the defendant holding the estate, and his letter implying a direct offer. The account was not prosecuted, and the matter rests. Till that matter is liquidated, till these affairs are arranged, the business between the plaintiff and the defendant is not closed.

Direct an account of the quantity of coal got beyond the 10,000 loads in every year of the lease, and the value of that coal; and upon the other hand, an account of all those claims made in the letter, dated the 18th of December, 1780, as a deduction from what may be coming due on the account of the overplus quantity of coal got; an account of the rents of the Newbold colliery since; charging the same by consent of the plaintiff at £220 a year; and an account of the timber and bricks.

The Lord Chancellor (Loughborough) was proceeding to declare the defendant a trustee for the plaintiff, as to the purchase of the Rotten Row and the manor of Thringston at the sum of £1,600; and in answer to the objection that it was not prayed in the bill, said it was within the general relief, and that the plaintiff was bound to take it, for no dissent was expressed from the letter of 1781, in which the defendant desires to set off that against so much of the demand; and if Bridge had pressed him, he would have said he meant to give the plaintiff the benefit of the purchase; but his Lordship added, that he would leave him to his election, either to take it or not, and declared that the defendant, conveying the estate purchased for £1,600, has a right to set off that against so much of the demand, with the like direction as to the purchase from Dawson and Cotton.

BEAUMONT V. BOULTBEE.

(7 Vesey, 599. High Court of Chancery, 1802.)

Account—Fraud. Account opened and general account decreed against an agent who was also tenant to his principal, for fraud both in allowing the use of certain levels in the mines of which he was agent to be used in working adjoining mines without accounting to his principal, and also for fraudulent misrepresentations in obtaining the lease and concerning the product of the mine.

Steward taking lease, must account as a confidential agent. The character of agent accompanying him in his situation as tenant, deprives him of the benefit of an objection that might be competent to another person; as the laches of the plaintiff in not bringing forward the demand at an earlier period; affirming on rehearing same case, 5 Vesey 485. *Ante* 253.

The decree in this cause directed an account of the quantity of coal got from the Newbold colliery beyond 10,000 loads in every year during the lease, dated the first of August, 1760, and of the value thereof; and an account of what was paid by Joseph Boulton, deceased, to Edward Dawson and John Cotton respectively, for the purchases from them; and interest to be computed thereon at the rate of four per cent. per annum from the respective times of payment, until Boulton had

raised so much coal beyond the quantity of 10,000 loads in each year as was sufficient to repay such sums of money so paid to Dawson and Cotton, with interest thereon computed as aforesaid; and that what should be found due in respect thereof, should be deducted from the value of the overplus of coal got from the said colliery. The master was directed to inquire whether the defendant would elect to convey so much of the estate called Rotten Row and the manor of Thringston, as remained unsold, to the plaintiff; and, in case the defendant should not elect to make such conveyance, it was ordered that he should pay the value of such overplus of coal, after such deduction as aforesaid, to the plaintiff; and, if defendant should elect to convey, then the master was also to take an account of what was paid by Joseph Boulton, deceased, for the purchase of the said estate, and compute interest on the said purchase at the rate of four per cent. per annum from the time of payment of such purchase money, after deducting what had been received for the part of the said estate sold; and in such case it was further ordered, that what should be found due for principal and interest of the said purchase money after such deduction as aforesaid, should be deducted from the aforesaid value of the overplus of coal got from the said colliery; and in such case it was further ordered, that the defendant should convey so much of the estate, called Rotten Row and the manor of Thringston, as remained unsold, to the plaintiff, free from incumbrances.

A petition was presented by the defendant, praying a rehearing of so much of the decree as directs him to account for the extra quantities of coal got by Joseph Boulton, deceased, from the said colliery, beyond the 10,000 stack loads per annum.

Mr. Mansfield and Mr. Hart, in support of the petition of rehearing, insisted principally upon the length of time elapsed before the demand; a demand set up against an executor; the property having been disposed of under the impression that no such demand would be raised; the vouchers lost, etc.

Mr. Richards and Mr. Stanley, in support of the decree, urged the ignorance of Bridge upon the subject; and the duty of Boulton, in a situation of trust and confidence, to protect his employer in his dealings with any other person, much

more in any bargain with himself. They compared it to the case of *Gibson v. Jeyes*,¹ a sale by an attorney to his client, and, with reference to the advantages gained by dealing with the owners of the adjoining collieries, to the cases of trustees and executors dealing with the trust property for their own benefit. Admitting the hardship, in many cases, of proceeding against an executor after a considerable length of time, when vouchers may have been lost, etc., that objection, it was insisted, was not applicable to a case where there was no suggestion of that fact, and no doubt that the money was still due; the son also having assisted his father in all the transactions, and the disposition made by the father of his property being necessarily subject to the consequences of having acted in this manner.

The CHANCELLOR LORD ELDON (after stating that part of the decree which was the subject of the petition).

The bill also prayed relief, which appears to have been denied by the decree, particularly an account of all dealings and transactions from 1773 to the settlement of the last account; and relief is prayed, if the court does not think proper to open those accounts, for liberty to surcharge and falsify. Neither relief was given as to so much of the transactions up to the last settlement of accounts; but the court has contented itself with giving the account from the foot of the accounts so settled.

The petition applies only to one particular direction; and it will be necessary for understanding this case thoroughly, and will be some security for a right decision, to consider all the circumstances of the transaction, from 1757 to the filing of the bill, certainly taking care that inferences arising from one transaction shall not press too much upon the judgment to be formed as to another transaction; but every transaction in the history of the business is in some degree to be considered with regard to every other transaction in the same period.

It seems a person named Yarwood, a relation of Boulton, was in possession of the property at some period previous to 1757. At what time Boulton himself came into possession, I can not determine; as there is a different result from the

¹ 6 Vesey 266.

papers. There is something like an agreement for him to take possession in 1756; but from the accounts, he does not seem to have taken possession till 1757. He took possession, as it appears from those accounts, previous to the lease, at a rent of £200 a year as to the colliery; for they give credit to Sir George Beaumont for that rent previous to the lease. Also, at a very early period of the accounts (1760), before the lease, there is a document, an account settled, which has a tendency to show what was the nature of the duty Boulton took upon himself for the salary of £20 per annum; for though subsequent to the lease, that salary was frequently and generally charged dryly for collecting the rents, yet the first time there is any mention of the duty in the accounts, the entry is thus made:

“For looking after your estates and collecting your rents for one year.”

And it is impossible upon the letters, and attending to the conduct of the present defendant, when his allowance was raised from £20 not to perceive that it was understood that there was attached upon him the duty of an under-steward, subject certainly to the revisal of a superior steward, as usual in the case of a gentleman of large fortune, who can not personally manage his own affairs. There is decisive evidence, under the hand of the Boultons, that it was the duty of Boulton, to look after the estate rather more than merely collecting the rents; and that on that account, he had the property cheaper in addition to his salary of £20 a year. There was an obligation resulting from the duty of the mixed character of tenant of the colliery and part of the estate, and in a sense the manager of the whole estate. It was not in the nature of things, considering Bridge's residence and engagements that he could control as a duty upon him, for the improvement, melioration, and management of this estate except acting by Boulton's advice; and I agree with Lord Rosslyn, as represented in the report, that, to a certain extent, a duty was imposed upon him proposing to derive interest in the estate, to represent truly what he knew of it from his intercourse with it as steward. It appears by a letter dated the 1st of June, 1757, in Boulton's hand, that he had been as early as that date dealing with Dawson for the

coal in his land; and at that time dealing on behalf of Sir George Beaumont.

It is necessary to give very particular attention to the contents of the lease. I am not able to satisfy my mind, how this lease, upon the face of it, only reserves the rent of £140 a year, when it is clear £200 was the stipulated rent paid up to 1760, and a bond was given for the additional rent of £60; whether it was upon some management with respect to the public taxes, or what was the plan, I ought not to conjecture, and certainly I can not determine; for there is no evidence upon it. This is a dead rent. It was not to be apportioned with regard to the quantity of coal got; but that rent was to be paid at all events. The lessor seems to think it for his benefit to have what they call a going or working colliery; and undoubtedly in many instances it prevents the customers going elsewhere. Therefore, an obligation was expressly imposed upon Boulton, that he should work the mine, and in a husbandlike manner; and a great variety of expression is used for that purpose; and a power of inspection is reserved to the landlord and his agents; and there is an express covenant by Boulton to deliver up at the end of the lease all the premises, and expressly to keep in repair the fire-engine, and at the expiration of the lease to deliver it up in at least as good condition as it was at the beginning of the lease. Then he covenants not to work beyond 10,000 loads in any one year.

This lease, when we are considering the effect of it in a court of justice, is a bargain with which the parties at the time must be taken to be perfectly contented. It must be taken that Sir George Beaumont was content to demise this property, and it is not necessary to look for the present, at the charge that he had not sufficient information; and Boulton must be taken to have been content at that time to take the premises, such as they were, and in such condition; the engine in the state of repair in which it then was, and all the premises as they were; and with the obligation to work the colliery according to his covenant, and the necessary effect is, that if the machinery should not be sufficient during the lease, he must be understood to be content with the obligation at his own expense to make it sufficient. There is also a cove-

nant which imposes upon him, as a duty, not merely to place himself in a situation to be called upon to make satisfaction for a breach of his covenant, but to observe it, and making it his duty, generally speaking, to forbear working any coal beyond 10,000 loads. Having entered into the lease, he recollected that he might take more or less in different years, and therefore there would be an inconvenience in being limited to that quantity in each year; and that, upon the whole, it was not expedient between lessor and lessee; for I now put it so. I doubt a little, whether that construction of this memorandum, which supposes that the account of these overworkings could not be settled till the end of the lease, was the necessary one; though it is clear Boulton acted upon it, as if that was the construction, for no account of the quantity of the overworking was made up till 1780. That memorandum is a material stipulation, having reference to the covenant in the lease, intending to secure to Sir George Beaumont that if the colliery should be thrown upon his hands at the end of the lease, it should be a going, working colliery, and he should take possession of a colliery producing a profit. Nothing material occurred from the execution of the lease till 1769, except that accounts were rendered to Bridge of the rent of the colliery—of the management, in a sense; for I take the letters accompanying those accounts to be important evidence as to the duty with which Boulton's character clothed him; and these accounts, in common with those down to 1780, are accounts with regard to which, though Bridge was put in possession of the vouchers as to other persons, he was not as to the accounts between himself and Boulton.

I should have had very strong doubt, whether, attending to the character in which Bridge and Boulton stood, it was competent to the latter, if the equity was pressed to the utmost, to complain of a decree going a great deal further upon dealings and transactions between 1783 and the date of the decree, than a decree which does not touch any account in that period; whether it is competent to any under-steward to be permitted to take advantage of accounts, as settled, which he, owing a duty to his master, knew another, owing also a duty to his master, had not settled with those forms, and that production giving authenticity to settled accounts as such, and it would

have been a very considerable time before I should have parted with those parts of the case, without giving a complete liberty to surcharge and falsify all those accounts, and upon that ground. This is material in another view; for such a transaction as an under-steward, between 1757 and 1794, having settled all accounts with the upper-steward without vouchers, and upon mere confidence, amounts to most weighty and momentous evidence of the confidence reposed, and comes to be material, as evidence of the extent and amount of that confidence, when the transaction took place, in 1780.

In 1763 the old engine, which Boulton was under covenant to repair, and to leave in a specified state of repair, seems to have been abandoned by Boulton; and I have no doubt that was upon some agreement or understanding with Bridge; for I perceive in the account of 1764 or 1765, Boulton takes notice that he had fallen a quantity of oak wood, which he says he is to be at liberty to apply without charge to the new engine. That account seems evidence that the nature of the transaction was, that if Boulton did not choose to go on with the old engine, under the obligations of the covenant, those obligations were to be transferred to the new engine; and he was content with that stipulation, provided the lessor only gave him timber necessary for the erection of the new engine. That is also the inference from this; that in a paper of May, 1766, there is an express article as to repairing the engine; and the lessor was to furnish nothing but a new boiler, which, it is evident, is not a very essential part of the expenditure of the repairs. It is incumbent upon Boulton to show, that was not the nature of the transaction; for there is no express written contract between him and his landlord.

From 1763 there is nothing to observe upon till the contracts with Dawson and Cotton. The contract with Dawson was one Boulton had in view as early as June, 1757, as appears from a paper of that date; and I will take it for this purpose, that it is not open to the observation, that there was a breach of trust from the communication of the level; but I take it as furnishing this question: upon what terms, as between him and his landlord, could Boulton acquire, by virtue of the command his tenancy gave him, such an interest in their coal, as it appears he did acquire in that coal, by looking into his express contracts with those persons?

The contract with Dawson was concluded upon the 6th of February, 1776, and contains these conditions: "but" (which is very important) "without sinking or making any pits, and" (which is also very important) "without liberty of stacking or placing such coal, when got, or" (which is also very important) "of making any roads, etc.;" and there is an express covenant by Boulton to take the coal in this manner, without any of these easements upon the surface of the ground.

The contract with Cotton in 1772, I need not state particularly. It was to get the coal under his land in the same manner, and with no more liberty and easement upon the soil than as to Dawson's.

Then see how it stands: Boulton being tenant to Sir George Beaumont, and Sir George Beaumont's colliery furnishing the level, with which the coal under Dawson and Cotton's lands could be got, and without which their coal could not be got, Boulton does not contract with them to get their coal, merely taking advantage in his character of tenant to Sir George Beaumont, having in that character the level that would enable him to get their coal; but having that advantage which would alone enable him in any manner to get the coal, he agrees in effect, to sell to them the benefit of that level, which is not his to sell, provided they will let him enjoy their coal in a way in which he could not without the leave of Sir George Beaumont; expressly undertaking to dig no shaft, to stack no coal, etc., but through his colliery to bring those coals to bank, and upon his land to stack them, from his land to sell them, and upon his land to make use of all the easements and liberties of pits, wagon-ways, etc. necessary for the sale of those coals. I should not hesitate to say, that in every act he did he was a wrong-doer, unless he meant Sir George Beaumont to have the benefit. He was a wrong-doer in selling the level, and all the other acts; and, as I should not infer that he meant to be a trespasser, unless that purpose is clear, the true effect of his acts, as evidence of his intention, is, that the benefit he had got as lessee, by the use of the property, should, upon reasonable terms, be acquired for his landlord, and not for himself.

Then in 1780 those transactions occurred, upon which this petition is brought; and I think with Lord Rosslyn, that to a

very considerable extent Boulton was clothed by his character as steward, with the duty of representing generally the circumstances of the estates fairly, to Sir George Beaumont, on behalf of all dealing for interests in the estate. But for the moment, laying out of the question the obligation attaching upon him as steward, it is clear, toward the expiration of the lease, he had broken his covenant by over-working; and if he took upon himself, for the information of the steward, to represent the terms upon which it was reasonable that the account should be settled, and took to himself the confidence of Sir George Beaumont, directly, or by taking to himself the confidence of Bridge, then he was bound to a reasonable and accurate representation; and it is difficult to discharge him from the obligation of the decree, taking it upon the transaction of 1780, and without looking more particularly at him in the character and with the obligations of steward. The representations began upon the 29th of November, 1780. The letter of that date contains an account of the coal got in 1757-8, 1758-9, 1759-60; and it states, that less than 10,000 loads were got in those years. I remark it; for, as steward, to any one else he would have said, it is quite unreasonable, that, when a man had the enjoyment under a contract and paid his rent for three years, because he had got less than he had stipulated for, in those three years, any part of the rent should be called back twenty years afterward, for reasons not directly connected with what passed twenty years before. That he would undoubtedly have said, if he had been landlord instead of tenant.

With respect to the account as given in the letter, and the payments to Dawson and Cotton, upon both those contracts, it is a question if it does not amount to the same thing by the calculation; for there would not be an excess, if those quantities are not taken in; but if that was not the result, it is too favorable to him to say, he was to take those coals as tenant to Sir George Beaumont; rather he must acquire them, or the full value, for his landlord, subject to just allowances only. I do not enter into the consideration, whether this was sent studiously, with all this dark expression, to the person who was to understand it, if any one could; for Bridge had dealt with Boulton in all the transactions. No one else

knew any of them. But it appears Bridge did not understand it.

With respect to Bridge's letter of the 13th of December, 1780, in answer, it is exceedingly true, a man in the relation of steward, coming to enter into a transaction of compromise, may put himself altogether in an adverse situation—may divest himself of the character of steward altogether, and deal so that no one can state that any confidence was reposed in him. This letter would perhaps by no means justify so much observation, if written to a man with whom Bridge was not in the habit of corresponding; that leading to a correspondence of a particular nature; but he is writing here, in terms very much as if he was writing to another tenant; and if Boulton meant to get the best bargain his knowledge would enable him to get, one question is, whether having acquired that knowledge in the service of his master, it should be used for that purpose? No question could arise that he might put himself in an adverse situation. But does he attempt to put himself in that character? He does not; and his answer to that letter amounts to a representation in nature of a warranty, that his advice was reasonable, and such as his two employers (for I consider both Sir George Beaumont and Bridge as his employers) might rely on; and advice of such character that I would not take upon myself now to say, if the propositions had been acted upon more distinctly than they appear to have been, it would not have been within the power of the court to relieve even in such case. But it is not necessary to consider that. This letter (printed in the report) is very material. The rough copy states: "I do not desire or expect any allowance." These words are struck out. I can not read this rough draft of the letter, without being convinced, he thought this a most impudent demand; so strong, that at first he could hardly pen the request. It is, to be sure, a very extraordinary demand in respect of short working for three years prior to the lease in 1760, without any demand in that year with regard to that; and when it was his duty to make it then; the lease being made by his master upon consideration of all the circumstances; and the lessee dealing for himself then, upon those circumstances

with regard to all he then thought it reasonable to demand. The rough draft then goes on thus:

“I am very willing to pay an additional year’s rent of £150 for every 10,000 loads,” etc. The words “I am very willing to pay” are struck out; and he inserts as an assertion, that “the most reasonable” and (not only that but) “the regular mode of payment would undoubtedly be an additional year’s rent of £150 for every 10,000 loads, which exceeds my quantity.” With respect to the statement as to the purchase of the Rotten Row and the manor of Thringston, there is evidence of a tender of that purchase to the guardians of Sir George Beaumont. The reason assigned why that purchase ought to have been Sir George’s and not his, is very material; because it leads to the question, what is the construction of the proposition in 1780, and, whether it was ever carried into effect. The conclusion of the letter shows that he expected an answer; and that answer was to close this proposition.

This letter contains certainly some propositions which may be called argument, and some which may be called assertion or representation. He begins with argument as to the coal wrought in the three years. I do not say much upon it; for it is upon the face of it so glaringly unreasonable, so monstrously open to objection, that no one can doubt upon, or misunderstand it; therefore, if all the letter contained was such a proposition, I should say, there was a distinct, intelligible letter, upon which they either had or had not acted. As to the additional rent of £150, it is a very different proposition to give that rent, and to state, as matter of fact (and it can be nothing else than matter of fact), that it is the most regular mode, which applies to a habit; and he adds the word “undoubtedly.” There never was a more unreasonable proposition. It is also as little the regular mode of payment as any that can be suggested. What do the *res gestæ* in this cause furnish as evidence upon that? When, in 1784, the new engine was erected, and the colliery was to be wrought, upon his reliance that Sir George Beaumont would do what was reasonable, did Boulton, in that or the subsequent year, imagine, that if he was to get 5,000 loads out of a coal pit, it was reasonable to increase the quantity to 10,000 upon the same terms? No, the bargain there is that which ought to have been made

in this instance, that the additional quantity is to be paid for at a much higher rate, viz., 1s. 6d.; the payment for the original quantity being 1s. The reason is obvious. The labor expense, capital, and work are infinitely less, because so much has been employed in getting the original quantity. But if that is not reasonable where the lease permits you to get additional quantities, it is much less so where it forbids that; and therefore you have no right to propose an additional rent; and the additional quantity ought to be accounted for according to the justice resulting from the obligation of the contract not to take more, viz., an account of the value, deducting only just allowances; that is for the labor of getting it. This is therefore a representation, false, if he had power to get more; and more palpably false, being forbid to get more.

There is a circumstance belonging to this case; that though Cotton's coal was contracted for in 1772, and Dawson's at a different period, I can not find that the facts of those contracts were ever communicated.

No visit of Bridge to the colliery could inform him of it; and if Boulton had given the communication he ought, he should have sent the contracts, and the express terms.

With respect to his statement as to the fire-engine, it must be remembered, he was under covenant to keep the old engine in sufficient repair; and all he could in reason demand appears from that document to be the oak timber. What right had he to demand anything in respect of that engine? Is it clear he had any right to dispose of the engine, supposing his tenancy put an end to, and considering his obligation as to the old engine? There never was a more improvident act—I do not say blameable, for guardians do not like to enter into those speculations—than permitting Boulton to be the purchaser of this estate of Rotten Row and Thringston. The representation made by Boulton was that it was to be purchased for £2,000. He himself gets it for £1,600. I do not recollect that the alteration of the price was communicated, which might be very material. In 1780, they were dealing for the terms upon which they were to part at the expiration of the lease, not with regard to the continuance of the relation of lessor and lessee. He speaks not of that which was deep coal at the time of the purchase, but of the future coal, and

future operations necessary to get at the coal to advantage. Upon the latter part of the proposition, Lord Rosslyn has understood it to mean this: that if the account was to be closed, not merely an allowance was craved with regard to the difference between £10 a year, and the interest of £1,600, but that it was closed upon these terms; that what ought originally to have been Sir George Beaumont's, should become his; which implies that he should pay for it, without anything said as to that; and that is the necessary construction of the letter, in my opinion; otherwise, it was a most unreasonable demand; if they were to part upon the terms that Sir George Beaumont is to have his old estate back, and Boulton to keep this, and if the assertion is true, that the coal could never be got to advantage without it, what consideration was Sir George Beaumont to have for paying the whole difference between £10 a year and the interest of £1,600, between the periods of the purchase and dissolving the relation? The consideration proposed was, that by means of that estate he will have the benefit of getting the deep coal adjoining. That benefit he can not have, unless he has the estate. That proposition, therefore, necessarily must be taken to mean that if the matter was to be settled upon the footing of this letter, it should include an arrangement, making Sir George Beaumont the owner of that estate, and not leaving Boulton the owner. Nothing was done upon that representation. The transactions afterward took place as to building the new engine, and giving leave to get larger quantities of coal than was stipulated; and they go till 1794, when the connection was dissolved, and they quarreled.

I make no observation as to the Newbold colliery, as to the rents of £220, and £50, beyond this: that Boulton had that colliery as he had all the others, upon these terms, in effect here stipulated, and stated to be fair and just. There is testimony to this effect, that at that time the Newbold colliery was thought to be failing, but they were dealing upon terms in that article, showing that Sir George Beaumont was acting upon Boulton's representation; and I can not look at the subsequent transactions, the land tax assessments, etc., without feeling this arising out of his conduct: that he felt a duty upon him to represent the state of the property, and that his

interest had so much influence as to make him not quite true to that; and if Sir George Beaumont had not submitted to a decree fixing the rent of that at £220, the court would not have been justified in not carrying the case a good deal further.

These circumstances are evidence to show the transactions were grounded in confidence in Boulton; which he knew he had, and knew he had accepted. There is a silence after 1780. That is all you can say. Nothing was carried to account in the subsequent period; nothing allowed in any settled account as to the engine, the coal got in the three years, Dawson and Cotton's coal, and the difference between the £10 a year, and the interest of £1,600; and all those accounts were passed by Bridge, under the idea that Boulton's accounts might be settled without vouchers. That was a very undue proceeding, and I am far from being sure that it is a safe principle to hold, that accounts so settled are to be held settled, and even without an opportunity to surcharge and falsify. I do not meddle with it further than to confirm my opinion that there was great confidence between these parties. I admit, there was no demand upon that head from 1780 to 1794; but the value of the objection from length of time, depends upon the complication and difficulty arising out of the subsequent transactions, particularly, where the original justice of the case is perfectly clear, as it is here; first, because there was no pretense for the demand as to the three years; secondly, as the assertion as to the £150 a year is, and may be shown to be, false. Then there is very little color for the demand as to the erecting the engine. As to all, therefore, of these three demands, none embarrass the consideration of the justice of the demand. I except the fourth, which stands upon a distinct consideration.

Then what is asked by the plaintiff in point of difficulty can not be stated higher than this: that of the value of the 48,000 loads got previously to 1780, it being obvious that before that time the value ought to be rendered to the plaintiff, the account shall be taken. It is objected that he has acted passively since. The answer is, that was upon representations by a person, meaning, that the plaintiff should repose confidence in him; who accepted that confidence; and authorized him to deal upon what amounts to a representation, that the

confidence should not be abused; and it is to be remembered, this is not like what the case would have been, if all the accounts had been closed in 1780, and there had been no subsequent dealing; but, till 1794, facts appear amounting to demonstration, that a confidence was reposed which was thought to authorize the most culpable negligence, and was not withdrawn till 1794.

These grounds are sufficient to support this decree. But, I am also of opinion, that this was a compromise upon terms, one of which was an offer to the plaintiff of the estate purchased for £1,600 at that price; for otherwise there is no sense in what is said as to that estate, consistent with any just proposition. Until that proposal was determined upon, in that as well as in all other respects, it must be considered as treaty and proposal.

Upon these grounds I think the decree, in this part is, upon the whole, right. I do not enter into the consideration of hardship. Considerable attention is to be paid to that, where there is any strong doubt as to the justice of the decision. It ought to be attended to in a reasonable degree, before the decision is come to; but attending to the circumstance, that the party is dead, it does not appear to me that, within the rules and principles of the court, this relief ought to be denied. It is true, Boulton is dead; but if anything passed between the plaintiff and Bridge after the plaintiff came of age, a cross-bill might have been filed, and considering the confidence between Bridge and Boulton, the representations of the former to Sir George Beaumont must be taken in some degree to be Boulton's representations. But considering the confidence between all parties, I should be very unwilling to say that the master could be bound by anything short of a clear explanation of the whole matter; an understanding of all that is reasonable and unreasonable, and a perfect disclosure of everything enabling him to understand; such as any one would have given, if an express declaration had been made by the other, that he acted upon confidence. It is clear, Bridge did not mean to bind anything by his own act. His letter states an intended communication to Sir George Beaumont, which might have been got at by a cross-bill. To a

given degree the complaint of want of information proceeds from that.

Decree affirmed.

The LORD CHANCELLOR ELDON added, that he should certainly have given leave to surcharge and falsify those accounts; considering it extremely dangerous, that accounts settled between two stewards in this way, should be considered settled accounts. The principle requires this to be guarded, so as to prevent this decree from being considered as establishing, that this ought to take place.

BEAUMONT V. BOULTBEE.

(11 Vesey, 358. High Court of Chancery, 1805.)

Claims disallowed. Claims by the agent for expenses on account of his principal's mine, which, from the conduct of the agent, (undertaking the business without authority or agreement) could not be ascertained, disallowed.

Interest. Interest not carried further than the time the bill was filed, on the ground of acquiescence.

This cause came on upon exceptions, taken to the master's report by the defendant; objecting that the master had not made him sufficient allowance for the agent's wages, in proportion to the increase of the coal got beyond the stipulated quantity; for the benefit the plaintiff derived from the use of the fire-engine, and in other respects. The cause also came on for further directions.

Mr. HART, for the defendant, insisted, upon the acquiescence of the plaintiff, that interest could not be carried back further than the time when the bill was filed.

The LORD CHANCELLOR ELDON. As I understand this case upon the exception, it is put thus: that these expenses Boulton would have been at, whether he worked the extra coal or not. The great difficulty is, that, where there is a charge for actual work and labor, you may calculate exactly that, if it costs so much to raise 20,000 loads, it will cost so much to raise

30,000; but with regard to allowances for agent's wages, there is no rate of proportion; for you may get an agent for 30,000 loads for very little more than for 20,000 loads. So as to the fire-engine. If you could bring a distinct case; that, before the new colliery was entered upon, you paid an agent £10 a year, and, after the new colliery was begun, he insisted on having £12 a year, that I understand; but what rate is there to go by here? The fire-engine is merely to draw off the water. That has nothing to do with raising the coal. He must have had some people attending the engine all day long. The difficulty is to get at any *ratio*; and, where that difficulty occurs, who is to suffer; the man who enters upon the concern without making his agreement beforehand, or the other party upon whom he enters? The inference is fair, that, if 30,000 loads have employed 30 men in a year, one-third of that quantity will employ a third of that number; but the additional expense of agent's wages, working the fire-engine, etc., can not be paid for by reference to the excess beyond the stipulated quantity. For, in many cases, the excess can be got just as cheap as the stipulated quantity. It is upon the defendant, to show what the master could reasonably have done. The principle is fair enough, that, if a man chooses to work my coal in the dark without letting me know, he ought to make a pretty clear case to entitle him to payment.

I can make nothing of the first exception. The second goes upon this, that the plaintiff has had the use of the fire-engine in a certain proportion. I suppose the answer is, that Boulton was under covenant to have a good fire-engine all the time; and it was to be left at the end of the term; and that the engine that did for the stipulated quantity, would do for the excess. It comes all to the same thing. I can easily conceive, and perhaps the truth may be, that the defendant may not have allowance enough; but, where a man chooses to embark in a concern of mine without my leave, if he does not come off quite so well as if he had made a previous contract, he must take the consequences.

Upon the further directions, as to the interest from the time of the bill filed, there is no doubt. The only question is as to that period which is called the period of acquiescence. I will read the reports of the case, before I decide it; but, if

this case had been originally before me I should have made a much stronger decree than Lord Rosslyn made.

August 12. The LORD CHANCELLOR ELDON. The only question remaining, that of interest, is of considerable importance. I have looked through the reports both of Lord Rosslyn's judgment and mine, upon all the circumstances of this case; and, under all the circumstances, my opinion is, that this is not a case in which interest ought to be given before the time of filing the bill. The ground on which that opinion is found is this: Old Sir George Beaumont died in 1762. The present Sir George Beaumont was then six years of age. The matter went on through his infancy, and he afterward went abroad. He returned in 1784, at which time consequently he was twenty-eight years old. From 1784 to 1790, old Boulton lived. There was a great deal of communication between them upon this, but no bill was filed in his life; and he died certainly under the persuasion that no demand was to be made upon him. The present defendant had the misfortune, under these circumstances, to be his residuary legatee; and after the death of his father no bill was filed against him till 1798; and upon looking both at Lord Rosslyn's judgment and mine, as they appear in the reports of this case, though we were of opinion there was enough to authorize the decree, I see we were both obliged to struggle through the circumstances of difficulty which all this length of time had thrown in the way. It is enough, under such circumstances, if he pays this money, for which he is made accountable by the decree, with interest from the time of the bill filed; and I think he must pay the costs of the suit. The interest is to be paid upon all the sums found to have been due from the defendant at the filing of the bill. The defendant may have suffered from the length of time; but if this bill had been filed in the life of old Boulton, or, if the cause had been heard for the first time before me, he would have certainly suffered a great deal more. One of the circumstances, upon which I think I ought not to give interest prior to the filing of the bill, is that long before the bill filed, all parties knew very well what was the excess of the getting.¹

¹ Same case, *ante* 253, 263.

BEAUMONT ET UX. V. FIELD.

(1 Barn. & Ald. 247. In the King's Bench, 1818.)

Letters of agent to explain deed. A deed purported to convey all the "lands now in the occupation of widow Kellett and sons," the deed being the consummation of a contract commenced by a series of letters of the grantor's steward, who was an active agent in the transaction and had witnessed the deed. *Held*, that the letters were admissible in evidence, to explain the latent ambiguity in the deed.

Trespass for breaking and entering coal-mines. Plea, not guilty. At the trial before the Lord Chief Baron at the last assizes, for the county of *York*, it appeared that the mine where the trespass was alleged to have been committed before *July*, 1790, was the property of Sir *Thomas Blackett*, and formed part of what was called his *Wibsey* estate. The plaintiffs, as his devisees, now claimed the same; the defendant *Field* had given directions for doing the acts which were the trespasses complained of in the declaration, and he gave these directions as the agent of *Jarratt* and *Hardy*, who were engaged in working the mine, and claimed to be entitled to the same under deeds of lease and release, made in *July*, 1790, by which *Sir T. Blackett* among other things, granted to them all the coal-mines at *Cold Harbor* farm, and also in the several lands then in the tenure and occupation of widow *Kellett* and son, and others, naming the rest of his *Wibsey* tenants. At the date of the deed there was no land in possession of persons answering the description of widow *Kellett* and son; although the mine in question was under lands then in the possession of a J. Kellett, who was the son of a widow Kellett, and these lands lay contiguous to *Cold Harbor* farm. To explain this latent ambiguity in the deed, the defendant gave in evidence an agreement, made the 23d of December, 1789, attested by L. Nobol (who at that time was Sir *T. Blackett's* land steward), by which *Jarratt* and *Hardy* contracted for the purchase of all the coal at *Cold Harbor* farm, and in the lands and grounds occupied by the widow Kellett and son, etc.; and then further to show that Sir *T. Blackett* intended to include under the words "lands occupied by the

widow *Kellett* and son " they offered in evidence two letters from *Noble*, addressed to *Jarratt*, the one bearing the date the 31st October, and the other on the 18th *December*, 1789, only a few days before the date of the agreement. In the first he stated that he had spoken to Sir *T. Blackett* about the coal in the farms at *Cold Harbor*, etc., at *Wibsey*, and that he had no objection to sell them to *Jarratt* upon certain terms therein specified, and he concluded by desiring an answer. In the second letter he desires *Jarratt* and *Hardy* to call upon the following Wednesday (which was the 23d of December), or Thursday, when he had Sir *T. Blackett's* order to say he would be at home.

The learned judge, however, rejected these letters, and the plaintiffs having obtained a verdict, Hullock Sergt. in *Michaelmas* term obtained a rule *nisi* for a new trial, on the ground that these letters ought to have been received in evidence. And now,

Topping, Scarlett, and Richardson showed cause. These letters were not admissible evidence until it was shown that *Noble* had a general authority to treat for the sale of lands or coal, or an express authority to write these letters. A land agent, as such, has not necessarily the power of binding his principal by contracts for the sale of land or coal, etc. A previous authority or a subsequent adoption of his acts, must therefore be shown. But, secondly, the letters were not offered in evidence to explain the state of the occupation at the time of the execution of the deed; the thing to be explained was, what was meant by the words "*lands now in the occupation of the widow Kellett and sons,*" but these letters could only show at most, that in an earlier stage of the contract, nearly nine months before the execution of the deed, it was in contemplation to convey the coal mines in the place in question; but they can not by any means tend to explain a deed which was not executed till after a lapse of several months.

Hullock, Sergt. Littledale and Tindal, contra: from the nature of the thing at this distance of time, it is next to impossible to show an express authority; but such an authority must be inferred from the relative situation of the parties. Although in cities or towns the solicitor may be the fitter

person to apply to on the subject of the sale of lands, etc., in the country, land-agents or stewards are more generally referred to; from his situation, therefore, and the fact of his being a witness to the agreement of purchase, a previous authority may fairly be implied; but Sir *T. Blackett* has at all events fully recognized Noble's authority by adopting, as the basis of the deed, the very agreement of purchase to which Noble was a witness, and to explain which, his letters written a short time before were offered in evidence. Then assuming that he had authority to write these letters, it is said they are not receivable in evidence, because they were not written near the time when the deed bore date; but in this case there being no persons in possession of the lands who answer the description of widow Kellett and son, the question is, what lands were meant to pass by those words; and that forms a latent ambiguity, and then parol evidence is admissible; and they cited Doe, demise of *Chichester v. Oxendon*, 4th Dow, p. 65, and referred to the opinion of the judges as there delivered by GIBBS, C. J.; and if parol evidence is admissible to explain the deed, then all evidence tending to give the explanation required, may be received. The circumstance of the letters having been written long prior to the execution of the deed, may diminish the value of the evidence with reference to the purpose for which it is produced; but if it be calculated in any degree, however small, to explain the deed, it is admissible, and the jury are to pass their judgment upon its value.

LORD ELLENBOROUGH, C. J.

I am of the opinion that these letters ought to have been received in evidence, and therefore there must be a new trial. Noble stood in the situation of receiver of rents to the estate of Sir *T. Blackett*, and was therefore most likely to be conversant with the property; he had been steward for a considerable time, and continued to be so up to the time of the execution of the agreement; he was the subscribing witness to it, which, at least, shows that he was conversant with the whole transaction; the contents of the letters themselves, are corroborative of this, inasmuch as they relate to the sub-

ject of the agreement, and state the orders of Sir *T. Blackett* upon it, and it is allowable to refer to them now, inasmuch as, at the trial, the nature of their contents must have been opened by the counsel, who offered them in support of his case.

Noble, therefore, standing in this situation to Sir *Thomas Blackett*, I think his letters were admissible; I will not say what would be their effect, if admitted; it is not necessary for me to do so; it may be equivocal; if, however, they were admissible, then the attention of the jury has not been drawn to them, and the party is entitled to have them exhibited to another jury, who are to pronounce upon the whole of the case.

BAYLEY, J.

I am of the same opinion. The letters themselves show that the steward was the medium of communication between Sir *T. Blackett* and the grantees; they ought, therefore, to have been received in evidence; I forbear to say what their effect would be if they had been admitted.

If the judge in his summing up had then stated them to be of no weight, a bill of exceptions might have been tendered to him, and the party might have had the judgment of a court of error upon the point. This advantage, however, he lost by the rejection; I therefore think, on this ground, that there ought to be a new trial.

ABBOTT, J.

I am of the same opinion, that the letters in this case ought to have been received; and I think that the contents of the letters, connected with the character and situation of the writer, and his being afterward the subscribing witness to the agreement, show sufficiently that they were written with the knowledge and authority of Sir *T. Blackett*.

HOLROYD, J., concurred.

Rule absolute.

HAWTAYNE V. BOURNE.

(7 M. & W. 595. Court of Exchequer, 1841.)

Agent can not pledge credit, even to save sacrifice. The resident agent of a mining company has no *implied* authority to borrow money upon the credit of the shareholders, to pay arrears of wages to miners; although they may have obtained warrants of distress upon the materials belonging to the mine, nor in any other case of emergency or necessity.

Debt for money lent, and on account stated. Plea *nunquam indebitatus*. At the trial before MAULE, J., at the last Cornwall assizes, the following appeared to be the facts of the case: The defendant, who resides at Liverpool, was the holder of 100 shares in a company established for the working of a mine called the Frewolvas mine, in the parish of St. Columb Major, Cornwall. The mine was managed by an agent, appointed by the directors of the company for that purpose. In March, 1839, in consequence of the shareholders not having paid up the calls regularly, the concern fell into difficulties, and the agent, from want of funds, became unable to pay the laborers, a considerable number of whom, their wages being in arrear, applied to the magistrates, and obtained warrants of distress upon the materials belonging to the mine. The agent, finding that these warrants were about to be put into execution, applied in the name of the company, but in fact upon his own responsibility, and without the knowledge of the shareholders, to the St. Columb Branch of the Western District Banking Company, for a loan of £400 for three months, which was advanced accordingly, and placed by the bank to the credit of the company, and out of it the arrears of wages were discharged. To recover the balance of that sum the present action was brought. There was some evidence of a conversation between the defendant and the agent, in which the former had asked whether they could not get money from the bank to keep the concern going; but this evidence was not left to the jury. The learned judge, in summing up, stated to the jury, that although under ordinary circumstances an agent could not, without express authority, borrow money in the name of his principal, so as to bind him, yet if it became abso-

lutely necessary to raise money in order to preserve the property of the principal, the law would imply an authority in the agent to do so, to the extent of that necessity; and he left it to the jury to say whether the pressure on the concern was such as to render the advance of this money a case of such necessity. The jury found for the plaintiff.

In Michaelmas term, *Erle* obtained a rule *nisi* for a new trial, on the ground of misdirection.

Bompas, Sergt., and *Cockburn* now showed cause. In the first place, there was evidence in this case to go to the jury of an express authority from the defendant to the agent to borrow money for the necessities of the mine. (ALDERSON, B.—That was not left to the jury; the learned judge reports, that he thought the necessity of the case created, by law, a presumed authority to borrow money.) It was material, as showing the necessity, that the defendant had himself suggested that course. But secondly, the proposition stated to the jury was correct. This money was advanced, not to a common servant or clerk, but to an agent who was intrusted by the company with authority to carry on the entire control and management of the mine, at a distance from his employers, with whom it was impossible for him to communicate on every sudden emergency.

Under such circumstances, the agent has an implied authority to raise money on the credit of the shareholders, whenever an immediate outlay of money becomes necessary for the preservation of the concern. The principle of law is, that where an agent is employed for a specific purpose, he has an implied authority to do what is essentially necessary to carry that purpose into effect. It is like the case of the master of a ship, who has an implied authority to borrow money for the necessary use of the ship, upon the credit of the owner: *Robinson v. Lyall*, 7 Price, 492; *Arthur v. Barton*, 6 M. & W. 138. In like manner, where a poor person met with an accident, and was attended by the parish surgeon, the parish officers were held liable for the amount of the surgeon's bill by reason of the necessity of the case: *Lamb v. Bunce*, 4 M. & Selw. 275. Suppose a coach were to break down on its journey, would not the coachman have authority to hire another on the credit of his employers, for the conveyance of the passengers to the

end of the journey? (PARKE, B.—The law provides for that which is common, not for that which is unusual; on that principle it is that the master of a ship has authority to charge his owners, because ships are ordinarily exposed to casualties. There was no evidence here, that it was the usual course to borrow money for the use of the mine.) Suppose water had burst in upon the mine, and it became necessary for its preservation immediately to employ persons to clear it, would not the agent have had authority to obtain an advance of the money necessary for that purpose? (PARKE, B.—Suppose the bankers would not have advanced the money without a mortgage of the mine, would the agent have had authority to contract for a mortgage?) There was no evidence of any repudiation of the act of the agent, which was done solely with a view to the benefit of the company, and the continuance of the concern; and there are many instances in which, where money has been laid out for a party's benefit, the law will imply a promise to repay it; as in the case of the acceptance of a bill of exchange for the honor of the drawers. (PARKE, B.—That is by the custom of merchants.) Which arises out of the necessity of the case. (ALDERSON, B.—A party who draws a bill according to the custom of merchants, knows that by that custom a party taking it up for honor has a claim upon him. He contracts on that footing.) Suppose the directors themselves had borrowed this money, would not the partners generally be responsible? Then, whatever they can do, they have invested this, their agent, with authority to do.

Crowder (with whom was *Erle*), in support of the rule, was stopped by the court.

PARKE, B.

This is an action brought by the plaintiffs, who are bankers, to recover from the defendant, as one of the proprietors of the Frewolvas Mine, a mine carried on in the ordinary way, the balance of a sum of £400, advanced by them to the agent appointed by the company of proprietors for the management of the mine. Now, the extent of the authority conferred upon the agent by his appointment was this only—that he should conduct and carry on the affairs of the mine in the usual

manner. There is no proof of express authority to borrow money from bankers for that purpose, or that it was necessary in the ordinary course of the undertaking; and certainly no such authority could be assumed. There are two grounds on which it is said the defendant may be made responsible: first, on that of a special authority given to the agent to borrow money; and secondly, on the assumed principle, that every owner who appoints an agent for the management of his property must be taken to have given him authority to borrow money in cases of absolute necessity.

There certainly was, in the present case, some evidence from which a jury might have inferred that a power to borrow money for the purposes of the mine had been expressly given to the agent; but that evidence does not appear to have been left to the jury, and therefore the verdict can not be supported on the first ground. Then, as to the second ground, it appears that the learned judge told the jury that they might infer an authority in the agent, not only to conduct the general business of the mine, but also, in cases of necessity, to raise money for that purpose. I am not aware that any authority is to be found in our law to support this proposition. No such power exists, except in the cases alluded to in the argument of the master of a ship, and of the acceptor of a bill of exchange for the honor of the drawer. The latter derives its existence from the law of merchants; and in the former case, the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is that the law invests the master with power to raise money, and by an instrument of hypothecation to pledge the ship itself if necessary. If that case be analogous to this, it follows that the agent had power not only to borrow money, but, in the event of security being required, to mortgage the mine itself. The authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent.

I am therefore of opinion, that the agent of this mine had not the authority contended for.

Whether he had or had not, was a question for the jury; but on the general principles of law, it seems to me that the ruling of the learned judge can not be supported, and therefore that the rule for a new trial must be made absolute.

ALDERSON, B.

I am of the same opinion. There is no rule of law that an agent may, in case of emergency suddenly arising, raise money, and pledge the credit of his principals for its repayment; and even if it were so, in this instance there was ample time and opportunity for him to have applied to his principals. Several cases have been cited as analagous to the present, but they have been already satisfactorily distinguished by my brother PARKE; *Lamb v. Bunce*, may appear to be a case similar to the present, but it is very distinguishable, for there is an original liability in parish officers to support the poor in their parish; and it appears moreover that the parish officers in that case were aware of the surgeon being in attendance on the pauper, and made no objection. Those were circumstances from which a jury might well infer a contract on their part to pay his bill. In the present case, there was no such evidence.

ROLFE, B., concurred.

Rule absolute.

MOSS v. THE ROSSIE LEAD MINING COMPANY.

(5 Hill, 137. Supreme Court of New York, 1843.)

Implied Agency of corporate officers.

Corporate powers under charter—Smelting works, houses, etc., as incidentals. The Rossie Lead Mining Company, a corporation, purchased a large amount of property, which had been previously used by the vendor in the business of washing and smelting lead ore, among which property was a house and lot, fifty acres of improved land, with several houses thereon, a school-house, threshing machine, etc. *Held*, in an action on a note for the purchase money, that the purchase of such items, in connection with the purchase of the smelting works, was not necessarily an excess of the power granted by the charter, and that such

items might be incidentally employed in carrying on large mining operations.

Ratification of purchase by officers—Evidence. When a mining corporation allowed two of its officers to purchase property, and afterward received and operated the property, *held*, a ratification of the purchase, even if originally made without authority, and that the corporation was liable on its notes for the purchase money given by such officers. *Held, further,*¹ that in a suit brought to recover upon one of the notes, the plaintiff might show he had obtained judgment by default against the corporation upon another of them, by way of fortifying the evidence of ratification.

Assumpsit tried at the Oneida Circuit, in September, 1842, before GRIDLEY, C. Judge. The action was by Joseph Moss, on a promissory note in these words: "Two years after date, for value received, the Rossie Lead Mining Company promise to pay to the order of Moss & Knapp, at the Ogdensburgh bank, four thousand eight hundred and forty dollars. Ogdensburgh, October 9th, 1839. (Signed) James Averill, President. D. C. Judson, Sec'y." (Indorsed) "Pay Joseph Moss or order. Moss & Knapp." On the trial, after proving the signatures of Averill and Judson, it was shown that Lewis Moss and Thomas L. Knapp composed the firm of Moss & Knapp, and that their indorsement was genuine. Some evidence was given by the plaintiff, tending to show that Averill and Judson acted as president and secretary of the defendant, at and about the time when the note in question bore date, and that they were accustomed to make notes in the name of the defendants. The evidence of their authority, however, was slight; but the circuit judge thought it sufficient, and allowed the note to be read in evidence; whereupon the defendants' counsel excepted. The note was admitted to have been transferred to the plaintiff, after due; and the defendants' counsel contended it was void, having been given in part payment for certain property sold to the defendants by Moss & Knapp, a part of which the defendants were not authorized by their charter to purchase: (Sess. Laws of 1837, p. 441.) The facts in relation to this branch of the defense were as follows: For several years previous to the date of the note, Moss & Knapp were engaged in the business of washing and

¹ This further holding is strongly disapproved in 5th Denio. See note *post.* p. 295.

smelting lead ore, having a large amount of property employed for that purpose. On the day of the date of the note this property was sold to the defendants for the sum of \$15,000, in part payment of which the note in question was given. Moss & Knapp also assigned to the defendants certain contracts for washing and smelting ore; and it was agreed, among other things, that all controversies which had before arisen out of a contract between the parties should be compromised and settled. All the property conveyed had been used by Moss & Knapp in the course of their business, and most of it was necessary to carry it on. Some of the articles, however, were not as the defendants insisted, essential to the prosecution of the business for which they were incorporated. Those articles were a house and lot, fifty acres of improved land on which were several houses used as residences for workmen, stoves in the houses, a building which had been occupied as a store, a school-house, a threshing machine, etc. It appeared that the defendants took possession of all the property so conveyed to them; that they entered into the business of washing and smelting ore, continued in their employ the workmen previously hired by Moss & Knapp, and that these workmen occupied the houses on the fifty-acre lot, and used the stoves therein. It further appeared, that a part of the property purchased by the defendants of Moss & Knapp, viz., the house and lot, had been sold by order of the chancellor, as part of the assets of the defendants. The plaintiff's counsel offered to show that a judgment by default had been recovered against the defendants on another note given at the same time, and upon the same consideration with the note in question. The defendants' counsel objected, but the judge received the evidence. Exception.

The defendants' counsel contended and asked the judge to charge the jury, that the property for which the note in question was given consisted in part of articles which the defendants had no lawful authority under their charter to deal in, or to be in any manner engaged in buying and selling; and that, if the note was invalid as to a part, the plaintiff could not sever that part from the other, but must fail as to the whole. The judge refused to charge as requested, and instructed the jury that the whole consideration of the

note was good and legal. The defendants' counsel excepted. The jury rendered a verdict in favor of the plaintiff for the full amount of the note, with interest; and the defendants now moved for a new trial on a bill of exceptions.

R. H. GILLET & S. BEARDSLEY, for the defendants.

J. A. SPENCER, for the plaintiff.

By the Court, COWEN, J.

If the proof of agency in Averill and Judson was defective when the note was read, the defendants' proof supplied the defect. The company took possession of the property for which this note, with others, was given; thus ratifying the transaction with Moss & Knapp: Story on Agency, 239, § 244. Moreover, the judgment by default against the defendants upon another note given for the same consideration with that in question, at least tended to fortify the other evidence of ratification, if it was not of itself conclusive. The sum of the defense is, that the defendants purchased an expensive apparatus for smelting and washing lead ore, a branch of business for the carrying on of which they were incorporated. The bulk of the property, it is not denied, was immediately useful for that purpose, consisting of lands, buildings, machinery, utensils, etc. Among other things, some controverted questions, apparently involving important interests, were compromised by the transaction. Moss & Knapp, as proprietors and operators, fitted out the establishment according to their own views, attaching to it some trifling articles, which, in the abstract, might not come within the corporate powers of the defendants. However, it seems the vendors were not willing to except anything, and the defendants took the whole. We must, if necessary, intend that this was so, on the presumption that they would not willfully transgress their powers. It might, therefore, be inferred that they purchased the extra land, if any, the school-house, threshing machine, etc., as the *sine qua non* to a bargain which, on the whole, was valuable and pertinent to their business. Such a thing they had a right to do. Besides, I am not aware that a corporation, more than another, may purchase and convert an article to its own use, and then ob-

ject that it acted beyond the statute power. It is itself a sort of agent, and must be the judge as between itself and the vendor, whether the article be wanted or not. The vendor can not pronounce upon the question. A school-house or threshing machine may be useful, though it be conceded that the corporation have no power to keep school, hire a school-master, or embark in the employments of agriculture. The materials of either may have been desirable for improving the legitimate apparatus. Being on the spot, it might have been thought prudent to take them to pieces and devote their parts to lawful repairs. The purpose is a secret between the company and the hands that transact their business; and as against the vendors, who have not been told that the purchase was an idle one, the company must be estopped. If they really abuse their power in making purchases of that sort, the people have a remedy by information, in nature of a *quo warranto*. The vendor knows not, nor can he conjecture, that his vendees are engaged in violating the policy of the country. He is innocent; the vendees alone are guilty.

Suppose a corporation to purchase land beyond the value allowed by its charter, the remedy would be to proceed against the land as a *mortmain*; not to throw the loss upon the innocent grantor. Purchasing a shop for the purpose of keeping goods and carrying on trade, is objected to. But is the loss to fall on the grantors of the shop, or the vendors of the goods? The goods to be purchased, for aught Moss & Knapp knew, might be wanted by the workmen of the company in payment for labor, and be even more acceptable than cash. Indeed, we know that, in practice, corporations for manufacturing purposes sometimes establish regular shops of trade, with the primary view of exchanging goods for labor. Workmen are accommodated in this way, and a profit is made on the goods. Are the vendors of such companies, from whom they purchase at wholesale, to be told that some of the goods were got for objects of general speculation, that the consideration was *pro tanto* illegal, and that in an action for the price it must be reduced accordingly? Some of the property bought of Moss & Knapp, it is admitted, went to pay the debts of the defendants, having been sold by the receiver under an order from chancery. Yet this very property is among

the things which they object to pay for, on the ground that in fact it was not necessary for the operations of the mining business. How could Moss & Knapp know that? They had thought the same property material as a part of the apparatus while in their own hands, and used it in the business for which the company was incorporated. Where the vendors are apprised that a company are acting in fraud of their charter, and knowingly sell for the purpose of effecting the fraud, a different question arises. But tenements being taken in lease, or goods purchased, though even for a criminal object, such as carrying on smuggling, or for the purposes of prostitution, this being a secret with the lessee or vendee, forms no defense against an action for the rent or price by the persons from whom the lease was taken or the goods obtained. If articles bought by a corporation can not possibly be of any use in the line of corporate business, but the purchase is necessarily an excess of power, a question might be raised on that ground. Yet in dealing with corporations created for manufacturing purposes, who, that does not make a part of them, shall be holden to penetrate the ramifications of their business so far as to fix the boundary of possible utility? Such a company as the defendants', must have lands, houses and wood, as well as mines, machinery and utensils. They may resort to all the ordinary means of paying workmen, and providing them and their families with residences; and who would deny, in this country of schools, that they may pay by providing school-houses and school-masters for the children of workmen? Education in certain branches is better than cash. Even the threshing machine, the purchase of which was thought by counsel to be such a scandalous excess, might have been quite useful in preparing and furnishing grain for workmen and their families, who might prefer this as an article of payment. It would, moreover, thresh the grain for teams employed in marketing the lead.

Is it quite clear that lands, to a reasonable extent, and within the limits of the company's capital, may not be cultivated, and crops raised by them as another means for paying the expenses of their business? But above all, I repeat, shall those by whom the company are furnished with articles of doubtful utility, be made responsible for the excess? I think not. This.

company were authorized by statute to exercise a general agency, to which a large discretion was necessarily incident. The exigencies of their business and condition of their affairs, were known to themselves only. Acts done by such a company, which bear an equivocal appearance because they may be within or without the corporate power or the capital employed, must be tested by such rules as we apply to the acts of a general agent. The man who deals with such an agent is not bound to know that the transaction is within the scope of his authority. If it may be so, the principal can not repudiate unless he can show that the person with whom his agent dealt was privy to the fact of the excess. Nothing of this kind was shown at the trial of the case before us. Nor have I been able, from the evidence, to say that the circuit judge spoke too strongly when he declared the whole consideration of the note to be good and legal. Looking to the act of incorporation (Sess. Laws of 1837, p. 441), and the statute to which it refers (1 R. S. 602, 2d Ed.), and confining the defendants to powers expressly granted, it is impossible to say that they have been necessarily exceeded in any particular.

The judge did not say that the record of the former suit was conclusive. It seems to have been received as persuasive evidence that the defendants had acquiesced in the purchase. This, with the evidence of the defendants themselves, was abundant to take away the effect of the exception that Averill and Judson's authority was not proved. A subsequent ratification is equivalent to an original power: Story on Agency, 239, § 244. The confirmation of a part of the transaction, was an affirmance of the whole: Story on Agency, 245, § 250.

BRONSON, J., dissented.

New trial denied.

A number of cases arose out of the charter and purchase mentioned in this report. See *Moss v. Averell*, 10 N. Y. 449, which cites and agrees with the above opinion, but the judges stood, 4 to 3; also, *McCullough v. Moss*, 5 Denio, 567 (*Post* BILLS AND NOTES), which dissents from it on a vote of 11 senators against 8; see also, *Moss v. McCullough*, 5 Hill, 131, and *Moss v. Oakley*, 2 Hill, 265, the former of which is overruled and the latter disapproved in the case of *McCullough v. Moss*, *supra*. We report the case in the text as well as that from 5 Denio (thus giving both views), because they are so often cited, and on account of the importance of the principles, which are discussed rather than settled, by such wavering decisions.

THE DEEP RIVER GOLD M. Co. v. Fox.

(4 Ired. Eq. 61. Supreme Court of North Carolina, 1845.)

Agent can not assume adverse relation. While the relationship exists, an agent can not make himself a party adverse or opposed in interest to his principal. If employed to sell, he can not buy, and *vice versa*.

Distinction between ministerial and other agents. But this rule applies only to such agents whose employment is a trust rather than a service, and not to those employed merely as instruments of performance.

The rule not applied to agent forcing legal sale for just debt. A mining agent to whom the employing company was in arrears for a debt admitted to be just, after notifying the company of his intention so to do, sued and had judgment for his claim; after judgment, he notified them of his intention to levy and sell the property, to which notice no attention was paid, and the mines of the company were accordingly sold and bought in by him. In his previous dealings with the company, also, he had been allowed to take a lot of ore as payment on account, out of which he was alleged to have made an unreasonable profit, having concealed, it was alleged, its real value. *Held*, that as to the suit and sale, his conduct was mere self-protection, and that the charge of fraud on the ore purchase was not sustained by the facts.

Receiver preferable to injunction. The appointment of a receiver, is to be preferred to the alternative of enjoining mining operations. To stop the working of a mine is alike opposed to public policy, and to the private justice due to the party who may be found ultimately to be the owner: *Falls v. McAfee*, (*Post INJUNCTION BOND*) approved.

This was an appeal, both by the plaintiffs and defendant, from certain interlocutory orders, made by the court of equity of Guilford county, at the fall term, 1845, his honor Judge DICK presiding. The bill charges that the plaintiffs, by an act of the General Assembly, passed in the year 1835, were incorporated by the name of the Deep River Gold Mining Company, and as such were organized, and commenced business in the year 1835, and continued to carry it on until finally suspended. The officers of said company at the time the bill was filed, consisted of a president, Granville Sharp Patterson, and four directors, to wit: Roswell A. King, Lemuel Lamb, Joshua Phillips and Henry Ogden, all of whom were duly chosen, according to the act, and of whom Roswell A. King alone lived in North Carolina, the others in New York and Philadelphia. That by the provisions of the act of in-

corporation, all the property of the company is made liable to be sold for its debts, and that process, to subject it to such sale, may be served on the president, or any director or stockholder. To carry on their operations, the bill charges that the company purchased from Roswell A. King and others, several contiguous tracts of land, which were valued at the time at \$200,000, and at which price they were taken as stock. When the company commenced operations, the defendant Fox was appointed the agent to manage and carry on the business at a salary of \$1,500 per year, and one F. Wilkerson was appointed their clerk, at a salary of \$400.

The lands were found, upon examination, to abound in copper and gold ore, each very rich. Large quantities were sent to England and sold at a high price. The purpose of sending the ore to England, was to ascertain its value, and to enable the company, by a sale of stock, to carry on their operations more extensively and profitably. Sales were effectuated upon certain terms, and in consequence of a misunderstanding between the company and the English purchasers, the business of the company was suspended. The agent Fox, was, by letter dated the 1st of January, 1839, informed of this fact, and directed to discharge all the hands except two or three to take care of the property, and by letter, dated in the April following, and addressed to him, he was notified his services and Wilkerson's were no longer needed, and requiring him to forward a full statement of the situation of the firm; and the said Fox, subsequently, agreed with the plaintiffs to continue to act as their agent, at a salary of \$100 per annum. This new arrangement was finally closed or made at a meeting of the board, held in May, 1841, at which the defendant was present. The bill charges that, while Fox was so acting as their agent, he caused process to issue against the company, returnable to the August term, 1841, of the court of Pleas and Quarter Sessions of Guilford county, and obtained a judgment at the November term following, for the sum of \$1,166.36, which he claimed to be due for his said salaries as agent. Upon this judgment execution issued, returnable to February term, 1842, and was levied on all the property of the plaintiffs in the county of Guilford, including the several tracts of land so purchased and held by the company; that a

sale took place at May term, 1842, when the defendant purchased the whole of the lands at the price, in the whole of \$1,265—the several tracts having been sold separately, and being worth the amount at which they were taken as stock. The bill further states, that, at the meeting of the board in May, 1842, the defendant presented his account against the company, and made a representation of their affairs, at the same time stating the quantity of ore that was raised and on the surface of the mine, and which he agreed to take at the price of \$500, deducting which from his account, would leave a balance in his favor of about \$1,000. He was fully informed of the causes which produced the suspension of the mining business, and of the embarrassed state of the plaintiff's affairs, and in consequence thereof, promised not to press his claims, but that they might be paid at the convenience of the company.

The bill charges that the writ or process in the suit was not served on the president, but on Roswell A. King, one of the directors, who lived in North Carolina, and while said Fox continued the agent of the company and was living on the land; and that no notice was given to the plaintiffs (except by the service), of the issuing of the writ or the obtaining of the judgment or the sale of the land, and that the judgment was taken by default, and without an appearance for them or defense. It charges, that it was the duty of the defendant to have taken care of the interest of the company, and to have notified the board of directors of the existence of the suit and its progress. The bill charges, that in the sale of the ore, lying on the ground as set forth, they were grossly deceived by the defendant, both as to the amount of the ore and its value, and that the defendant well knew both the amount and value, being an experienced miner, and that it was from worth more than what the company owed him, and that, it and from ore subsequently raised by him from the mines preceding the sale to him by the sheriff, he actually realized the sum of \$6,000, deducting all expenses; and it calls for an account of the ore and its proceeds. The bill further charges that, if all just accounts were taken between the plaintiffs and the said Fox, it would appear that, at the time he took his judgment and sold the land, they owed him nothing, and that

at the sale, the defendant announced that nothing would be taken at the sale in payment by the purchaser but gold and silver, whereby purchasers were prevented from bidding, and the property of the plaintiffs was sacrificed, through the negligence and fraud of the defendant, who was their agent. The bill then charges, that as early as May, 1841, the defendant had formed the design of defrauding the plaintiffs out of their property, and, with that view in his conversations, depreciated the mines and the ore; that the plaintiffs were ignorant of both, living at a great distance from North Carolina, and that they had implicit confidence in the mining skill and honesty of the defendant, but that, since his purchase, the mines have turned out to be extremely valuable, as proved by letters written by the said defendant in 1845, to John Rutter. It then charges that the defendant has little or no property, except that obtained from the mines, and that he is still working them, and prays an injunction; and accordingly an injunction was granted. The answer admits the incorporation of the company, their regular organization, and the acquisition by them of the land, as stated in the bill. It admits the employment of the defendant as their agent, at the salary of \$1,500; that the business of mining was suspended at the time specified, and his dismissal from his agency in April, 1839, and denies, that, after that time, he acted as their agent, but that he did agree, for the sum of \$100 a year and the use of the land, to take care of the property of the plaintiffs. It admits that he did sue the company for money that was justly his due, and did obtain a judgment, and caused the execution to be levied on the land, and became himself the purchaser, and that the defendant now holds the sheriff's deed for it and claims it as his own, and denies that his judgment was taken by default, but states that at the return term of the writ the plaintiffs were represented by counsel, who entered the pleas of the general issue, payment and set-off, release, accord and satisfaction. The answer alleges that, in compliance with the directions contained in the letter of April, 1839, he caused the clerk of the company, Mr. Wilkerson, to make out a full statement of the affairs of the company from the commencement of operations to the time of suspension, which, together with an inventory of their effects in

Guilford county, was by him laid before a board of the company, which was held in Philadelphia, in May, 1839, with which account and inventory they were well pleased. At this meeting, he exhibited to the company his account, and demanded what was due him for his services; it was admitted to be just, but he was informed by the board that they had no funds. It was then proposed to him that he should take care of the land and property for the company, for which service they would allow him \$100 a year, and let him have the use of the land, pay him then \$100 of his account, his traveling expenses, and remit him in the course of two or three weeks, \$800 more on his account. He returned to North Carolina, but never received the money promised, except the \$100. The defendant denies he then promised not to press his claims, or that he would wait the convenience of the company. The defendant was again present at a meeting of the board in New York, in May, 1841, when he again demanded payment of his account, and received the same answer as before, when he distinctly informed them if he was not paid before the next county court of Guilford, he would put his claim in suit against the company. The directors then promised in two weeks to send him \$400, which they never did. The answer admits that the company, failing to remit the \$400 as promised, a writ was taken out by him as returnable to August term, 1841, of Guilford county court, and he had it served on Roswell A. King, who was both a stockholder in and director of, the said company, and at November term succeeding, recovered a judgment for what was justly due him, and no more; and that he filed in the office a copy of his account. The defendant avers, that immediately upon commencing suit, he informed the company by letter that he had done so, and, upon obtaining judgment, he notified John Rutter, one of the directors, of the fact; and that if funds were not forwarded to satisfy it, the lands would be sold at February term 1842. That no sale took place at February term, in consequence of King's having prevailed on the sheriff not to make it, promising to pay his forfeiture for him, to wit, \$100, which the defendant enforced. The answer further admits the purchase of the land by defendant, at May term, 1842, and that, at the preceding term, he had said he

would take nothing but gold and silver, being vexed with King and the sheriff for the postponement of the sale at that term, but, when the land was offered, he informed the company he would take any current bank notes.

Defendant denies that in these transactions he was acting as the agent of the company. He avers that after the sale, he had interviews and correspondence with some members of the company, when they were fully apprised of what had been done, and approved of the defendant's conduct, and that in confirmation of this statement, he received from the president, Mr. Patterson, and Mr. Ogden, a letter bearing date the 30th of May, 1842, which is as follows:

NEW YORK, May 30th, 1842.

SIR: In answer to your inquiry, we can only say, that as the company *would* not pay you the money *due* by them to you, in purchasing the property when it was sold by the sheriff, no blame can attach to you. As agent of the company, you certainly, both by your attention and competency, gave entire satisfaction, nor is any blame to be attached to you.

Signed,

GRANVILLE S. PATTERSON,
HENRY OGDEN.

The answer denies the value set upon the lands in the bill, and if they were of that value, Roswell A. King, one of the directors, lived within fifteen miles of them, and knew of the sale.

The defendant denies that he purchased the land and other property with any view to a speculation, but simply to save his debt, as the whole that was sold fell short by \$200 of paying his claim, and, in confirmation of this allegation, states, that, soon after making his purchase, he went on to New York where Mr. Patterson, the president of the company, and Mr. Rutter and Mr. Ogden, two of the directors, lived, and took with him the several sheriff's deeds, without having them registered, and offered to surrender the deeds both for the land and the personal property, if they would pay his debt and his traveling expenses. This they declined to do, saying the company had no funds; that the defendant must keep the property, and save himself out of it if he could. With respect to the ore, the answer states that he valued it at \$400,

but Mr. King insisted upon his giving \$500, and placing implicit confidence in the judgment and integrity of Mr. King, he agreed to take it at that price; and, in confirmation of this statement, refers to a letter from Mr. King to the company, under date of the 29th December, 1839, to that effect; and also to two other letters, one from Mr. Rutter, one of the directors, and one from the president, Mr. Patterson, agreeing to let the ore go at the price of \$500,—the two last letters of a date subsequent to the one from Mr. King. The answer further states, that after purchasing the ore, he considered it his, and that he kept no account of the proceeds, and is now unable to state them, as he had ore from other mines, which he worked with it, but denies that, in his belief, he realized from it more than he had before been receiving by way of salary at \$1,500 a year.

The answer denies, that upon a fair settlement the defendant would be indebted to the plaintiffs; on the contrary, it avers that the sum for which the defendant obtained judgment was justly due to him, and as to the ore sold by the sheriff, that a true account of it was contained in the inventory exhibited by the defendant to the president and Henry Ogden, at the time he offered to surrender his purchase. The answer further alleges, that by two deeds, the one bearing date the 30th day of May, 1842, and the other the 20th January, 1843, he appointed the said Patterson and Ogden his attorneys, to sell said tracts of land, and that they accepted the agency, and made efforts to execute it, as was shown by their letters addressed to the defendant—copies of which letters and powers of attorney are appended to the answers, as parts thereof. And that, in June, 1845, John Rutter came on to the defendant's residence in North Carolina, and was by defendant, and at his own request, appointed a co-agent with Henry Ogden, to make sale of the lands and mines, on account of, and for the defendant. Upon the coming in of the answer, on motion, the injunction was dissolved, so far as to allow the defendant to remove and use 10,000 bushels of the ore, then on the surface of the mines; and as to the residue, the injunction was retained until the hearing of the cause. From this interlocutory decree both parties appealed—the

plaintiffs from the first branch of it, and the defendant from the latter.

BADGER, for the plaintiffs.

MOREHEAD, for the defendant.

NASH, J.

We think His Honor erred, and that the injunction ought to have been dissolved in full. The plaintiffs by their bill, rest their claim to relief upon three grounds: First, that the defendant, when he made his purchase, was their agent, and in this court will be held to be a trustee for their benefit. Second, that the judgment was fraudulently obtained, no process having been ever served upon the president of the company or any stockholder, and no defense having been made for them. And thirdly, that the defendant was guilty of a fraud in purchasing from them the ore as set forth in the bill, in representing to them that it was not worth more than \$600, when he knew that it was worth a great deal more, and when in fact he realized from it and other ore, six thousand dollars, whereby their debt to him was more than paid. It is a well-established principle in equity, that an agent can not make himself an adverse party to his principal, while the agency continues; he can neither make himself a purchaser when employed to sell, nor, if employed to purchase, can he make himself the seller, and to this rule the exceptions are very limited. The justice and expediency of the rule are obvious and founded upon a plain reason. The principal does not get what he bargains for, in the employment, namely: the zeal and vigilance of the agent, for his own exclusive use: Paley on Prin. and Agent, pp. 11, 33, 34. Equity will therefore consider an agent so acting as a trustee, in the case of a purchase for his principal, and the purchase itself, but as a security for what may be found due him on a settlement of accounts between him and his principal. This case is not within the above principle. But the rule applies only to agents who are relied upon for counsel and direction, and whose employment is rather a trust than a service, and not to those who are merely employed as instruments, in the performance of some appointed service: Pal. on Prin. and Ag. 12.

If, then, the original employment of Fox, the defendant, was such an agency as forbade him to place himself, with respect to this property, in a position adverse to his principals, the plaintiffs, it is evident from the statement of the bill, that such agency had ceased before the commencement of his action against them. The bill charges that the plaintiffs, through their president, on or about the sixth day of April, 1839, addressed a letter to the defendant, notifying him that his services were no longer required, and directing him to forward his accounts. From the reception of that letter, the defendant ceased to be their agent as an officer in conducting their mining operations. The suit which Fox instituted against the corporation, was commenced in the summer of 1841. It is true, that, after he was thus dismissed from their service, he entered into a new agreement for contract to take care of the land and other property, for the use of the land and \$100 a year. But we do not think, that by this new agreement or agency, he stood in such a relation to the plaintiffs as to forbid his resort to the ordinary process of the law, to enforce the collection of a debt which was justly due him.

The second ground upon which the defendant's purchase is assailed, is equally untenable.

The bill charges that the process was not served on the president or any director, and that judgment was taken against them by default, and without any defense. The act of incorporation as set forth in the bill, subjects all the property of the company to the payment of their debts, and authorizes service to be made on the president, or in his absence, on a director, or in the absence of both, on a stockholder, a provision usual in such acts, and, in this case, peculiarly proper, as all the officers and stockholders, but one, resided out of the State. In May, 1839, the defendant in compliance with the directions contained in the letter from the president, and dated in the April preceding, met the board of directors in Philadelphia; where as he stated in his answer, he presented a general statement of the affairs of the company, and his own account, and demanded payment of the latter, and that no objection was made to his claim as not being correct, but he was told that the company had no funds. At this meeting, the agreement was made as to taking care of the mines

and other property. He received \$100, and the promise of \$800 more in two or three weeks, which was never sent. Again, in May, 1841, he met the board in the city of New York, and urged the payment of his account. No complaint was then made as to its correctness, and he informed them, that, if not paid by the next court in Guilford county, he would sue them; and no payment being made, the suit was commenced returnable to August court. The writ was served on Roswell King, who was both a director and a stockholder, and, at the return term the usual pleas were entered on the record by an attorney of the court. And yet Mr. Patterson, the president and one of the plaintiffs, swear that it was not served on any director of the company. The suit then was regularly commenced, and as stated in the answer, regularly conducted to a judgment. We see nothing unfair in all this. His claim against the company was admitted to be just; he had been informed by the president and some of the directors at the north, that the company was without funds, and had been informed by Mr. King, himself a director, and a stockholder and creditor of the company, that the individuals composing it were all bankrupt. There was no property to which he could look for his indemnity but the lands, and the property of a personal character connected with the mines. What was he to do? Did the law require him to stand by and see other creditors seize this very property upon which his labor had been bestowed, and make no effort to save himself? We think not. But the defendant goes further. No sooner is his judgment obtained, than he informs the board of directors of the fact; informs them when the sale will take place, and assures them that, unless paid, the land will be sold. The lands were sold publicly, at the court house in Guilford county, on the sale day, as established by law, being the first day of the court, and do not bring, by \$200, what the executions called for. Mr. Fox again went on to New York; took with him the sheriff's deeds, without having had them registered, and offered to surrender the deeds and give up all the property, if they would pay him what was justly due, and his traveling expenses. This proposition on the part of the defendant is evidence that he had no wish to speculate on his late employers. It will be recollected, the case is before us,

not for hearing, but upon a motion to dissolve the injunction. In confirmation, however, of the statement made by the answer, is the letter of the 30th of May, 1842, written to the defendant by the president, G. S. Patterson, and Henry Ogden, one of the directors of the company, in answer to one written to them by the defendant, informing them of the sale; in which they state that the company would not pay him his claims, and that, in purchasing the property at the sheriff's sale, no blame could attach to him. With what propriety, then, can these plaintiffs allege that the recovery by the defendant was a fraudulent one? As to the irregularity in the recovery, as alleged, but which is shown not to exist, this court can take no notice of it, except so far as it may be evidence, with other things, of a fraud. Here it is not alleged, upon this part of the case, that the plaintiff has recovered that by law which, in good conscience, he ought not to retain; nor do the pleadings show that although the judgment was recovered for a true debt, yet it was iniquitously used, in which case the court would not hesitate to deprive the purchaser of the fruits of his iniquitous conduct; as was done in the case of *Lord Cranstown v. Johnston*, 3 Ves. Jr. 170, and cited for the plaintiff. Here the plaintiffs, or a part of them, not only admit, in their letter of the 30th May, that the defendant's claim was a just one, but that he had made a just and proper use of his judgment by purchasing at the sale: *Bissell v. Bozman*, 2 Dev. Eq. 160. In this case, the principles just stated are fully recognized and sustained. In addition to this, the plaintiffs Patterson, Ogden and Rutter, constituting a majority of the board of directors, actually became the agents of the defendant, to sell the mines thus purchased by him, and bargain for shares in the stock and an interest in the mines. On this part of the case, it is urged by the plaintiff's counsel, that these acts of the plaintiffs can not be considered as confirming the title or acts of the defendant, because it is not shown that they knew their rights; and the authorities cited by him sustain the position. These letters and contracts of the plaintiffs, with the defendant, are not offered as confirming his title. His title needs no confirmation; it is at law full and complete, but simply acknowledging that it is so. It has been further urged in the argument before us, that the defend-

ant and Roswell King fraudulently combined together to injure and defraud the plaintiffs in the sale of the land. It is sufficient on this head to say that it is not charged in the bill. Upon the third point made by the bill, the defendant's answer is full and satisfactory. It is charged that, availing himself of the ignorance of the plaintiffs as to the quantity and value of the ore which had been gotten out of the mine, he induced them to sell it to him at the price of \$500, when he knew it was worth much more, and that, in truth and in fact, he had extracted from it a much larger sum—a sum much more than sufficient to pay his expenses and all that the company owed him, and that, therefore, at the time he obtained his judgment, they owed him nothing. To this charge the defendant replies that he is not skilled in gold ore, and that in giving \$500 for it, he relied upon the judgment of Mr. King, both as to the quantity and value; and he produces the letter of Mr. King, directed to the plaintiffs, to sustain his answer.

Mr. King was a stockholder and a director immediately interested in procuring from the defendant as high a price for the ore as it was worth. It is not to be supposed he would be willing to take less than what he believed its real value. But it is said the defendant's answer to this charge, when called on to state how much gold he got from that ore, is unsatisfactory and evasive. It may be so; but we consider it entirely unimportant; the sale was a fair one, and whether he realized much or little, has nothing to do with the question before us. But the answer states facts that show the price given was a fair one, upon the whole. We see nothing in the conduct of the defendant of which the plaintiffs have a right to complain. So far as they were concerned as proprietors, his conduct has been fair, honest and honorable, and, if in any part of it he has lost sight of rectitude, it has been only when listening to the suggestions and allurements of the plaintiff themselves, in endeavoring to give to the mines a false and meretricious value, with a view to entice ignorant and unwary purchasers. In closing this case, we would call the attention of our professional brethren to what fell from this court, in the case of *Falls v. McAfee*, 2 Ire. 239. It was an action on a bond, given by the defendant on obtaining an injunction, restraining the plaintiff in working a mine. The court, after

remarking upon the heavy loss the plaintiff had sustained by the operation of the process awarded against him, observe: "The case arose early after the business of mining began, and the writ was improvidently awarded, without recollecting at the time, that to stop the working of the mine was alike opposed by the public policy and the private justice due to the party that might be found ultimately to be the owner, and that it would rather promote all interests to appoint a receiver, or take some other method for having the profits fully accounted for. It is indeed remarkable that the present plaintiff had not at the first opportunity, moved to discharge the injunction, by submitting to have a receiver appointed. We intend to express no opinion, nor even to intimate one, that this is a proper case for the appointment of a receiver, at the present stage of it."

The interlocutory order of the court below is erroneous and should be reversed, and the injunction dissolved absolutely, with costs, and the plaintiffs must pay the costs of this court. Per Curiam.

Ordered to be certified accordingly.

BROWN V. BYERS ET AL.

(16 M. & W. 252. Court of Exchequer, 1847.)

Superintendent can not borrow money—Special power, construed. By the deed of association of a mining company it was provided that its affairs should be conducted by a committee or board of managing directors, who were allowed to vote by proxy. B. was the resident director or local superintendent, reporting monthly to the committee, and was prohibited from expending or engaging the credit of the company beyond a certain monthly sum. *Held*, (1) that the board was not bound by drafts accepted by him for such board of directors even for the necessary expenses of the mine, unless accepted by express authority. (2) That a managing director, present only by proxy, was not bound by a vote of his proxy, authorizing the borrowing of money or the payment of drafts for money already borrowed.

Assumpsit by the plaintiff, as the public officer of the North and South Wales Bank, against the defendants as acceptors of

three bills of exchange for the sums of £126 17s 3d, £101 16s 6d and £148 8s 2d, bearing date the 27th June, 25th August, and 3d September, in the year 1842. The bills were drawn by one Robert Roberts, payable to his order two months after date, indorsed by him to Robert Lloyd, and by Lloyd to the banking copartnership, and were accepted by one of the defendants, "R. W. Byers," for the directors of the Llwyndu Mining Company. The defendant Byers suffered judgment by default; the other defendants pleaded that they did not accept the bills.

At the trial, before COLERIDGE, J., at the summer assizes for the county of Merioneth, 1845, a verdict was taken by consent for the plaintiff, damages £406, subject to the opinion of the court upon a case which stated in substance as follows:

In the year 1836, a company was formed under the name of the Llwyndu Mining Company for the purpose of taking on lease and working a certain copper mine, called the Llwyndu Mine, in the counties of Merioneth and Carnarvon. By articles of agreement under seal, dated the 27th of December, 1839, made between all the defendants, together with others, it was covenanted that the parties should become associated as a company, under the name of The Llwyndu Mining Company, for the purpose of working the said mine as co-adventurers, and that the affairs of the company should be conducted by a committee of seven shareholders, called managing directors. It was further stipulated that R. W. Byers should be and continue the resident director or manager, to superintend the said mine and the local concerns thereof, and to hire and employ a sufficient number of able and experienced miners and workmen, and provide all needful implements, materials and machinery, and in all respects to direct and manage the workings of the said mine, according to the reservations, covenants, etc. contained in the lease thereof, and so as most effectually to promote the interests of the said company, but subject to the instructions he might, from time to time, receive from the said managing directors; and that once every month he should transmit to the said secretary his accounts, showing the quantity of ore raised and made ready for sale, the sums paid and expended by him for wages and salaries, and for materials and otherwise on account of the said mine during the previous month, together with a statement

of all debts and liabilities due from the said company, and a full and correct report of the then state and prospects of the said mine; provided always, that the said R. W. Byers, or other local director for the time being, should not expend or engage the credit of the said company for any sum exceeding £50 in any one month, without the express authority in writing of three of the said managing directors.

The deed contained various stipulations as to the times of the meetings of the directors, the mode of voting, etc., among which was a clause empowering them to vote by proxy; and was executed by all the defendants. The defendants Jeffries, Smith, Huxham, James and Williams were, at the same meeting, appointed five of the seven managing directors; the defendant Thomas was also appointed a managing director in 1840, on the retirement of one of the two remaining directors; and all these six defendants continued in office until the end of the year 1842. The defendant Byers also continued to be the local director until the same period, and he regularly transmitted to the secretary monthly accounts of his expenditures for wages, materials, etc., in respect of the mine, which were called "cost sheets." The average monthly cost was from £95 to £150. In April, 1842, the affairs of the company became embarrassed, and no remittances were sent to the defendant Byers, on account of the expenses of the mine. On the fifth of May in that year, Byers applied to the North and South Wales Bank at Portmadoc for an advance, for the purpose, as he alleged, of paying the March cost sheet. The bank accordingly discounted for him a bill of exchange drawn by R. Roberts, and accepted by Byers as resident director for the directors of the mining company.

This bill, together with two others drawn and accepted in a like manner, for the payment of the cost sheets for the months of April and July, were renewed by Byers on their becoming due, and formed the subject of the present action.

During this time, Byers had not sufficient funds to pay the wages of the men and the other ordinary expenses of the mine for the months of March, April and July, except from the proceeds of the above bills, and the same were necessarily obtained and *bona fide* applied for that purpose.

At the time of the above advances, the bank did not know of, or make any inquiries respecting the deed of settlement,

or the extent of the interest of any of the defendants in the mine. On the 26th of June, on the 23d of July, and on other occasions, Byers informed the secretary and the committee that he had taken up money from the bank in payment of the expenses of the mine.

On the 27th of July, a special general meeting of the shareholders was convened, at which all the defendants (except Byers and James) were present, and Byers' communications were read, when it was resolved to wind up the affairs of the company, and a copy of the resolutions then passed was transmitted to the defendant Byers. On the 26th of October, 1842, the defendant Byers informed the secretary by letter that the several bills drawn by him would become due on certain days, and received for answer that the company knew nothing of the bills, and that no one was authorized to draw bills or raise money in their names. On the 17th of December, Byers wrote a letter to the committee, in which he stated fully the reasons of his drawing the bills in question, the dates and amounts of the bills, and the mode in which the proceeds had been applied; on the 21st of December, 1842, a special general meeting of the shareholders was held, at which the defendants Huxham, Jeffries and Smith were present in person and the defendants James, Thomas and Williams, by proxy.

On that occasion, Byers' letter of the 17th of December was read, and it was resolved, amongst other things, that the sum of £980 and upwards was due then from the company, and it being necessary to liquidate the debts immediately, it was the opinion of the meeting that the amount must be provided by the share-holders. The above sum of £980 included the amount of the bills, the subject of this action, the payment of which was the subject of discussion at the meeting.

The above facts having been proved, it was contended on behalf of the defendants, that Byers had no authority to accept the bills in question, or any bills, on behalf of the managing directors, nor could have any such authority by reason of the clause in the deed of settlement, restricting him from engaging the credit of the company to a greater extent than £50 in any one month. The question for the opinion of the court is, whether the plaintiff is entitled to recover in this

action upon all or any of the bills of exchange mentioned in the declaration; if the court should be of opinion that he is, the verdict for the plaintiff is to stand or to be entered for such sum as the court shall think fit; if the court should be of a contrary opinion a non-suit is to be entered.

The ATTORNEY-GENERAL for the plaintiff.

There was ample evidence to charge all these defendants as having expressly authorized the defendant Byers, the local or resident director of this mine, to accept the bills in question. (PARKE, B.—What evidence is there to fix the defendant James? He was not present at any meeting, but only appeared by proxy.) The deed enables the managing directors to attend and vote by proxy. (PARKE, B.—But only for purposes within the scope of the deed, which this is not.) That is the question. The deed provides that the local director “shall not expend or *engage the credit of the said company* for any sum exceeding £50 in any one month,” without the express authority in writing of the three directors. (PARKE, B.—That is, he may engage the credit of the company to the extent of £50 for the purposes of the mine.) Surely, then, he is equally authorized to pledge the credit of the company by borrowing £50 in order to pay the ordinary expenses of the mine instead of letting every workman have a right of action against the company for his wages. Besides, he is to send in to the company monthly statements of the *debts and liabilities* of the company.

That contemplates an authority on his part to impose debts and liabilities upon them. Could he not have bought goods for the mine on credit? If so, why may he not equally obtain credit for the like purposes, by means of the acceptance of a bill of exchange?

He referred to *Tredwen v. Bourne*, 6 M. & W. 461; *Hawtayne v. Bourne*, 7 M. & W. 595; and *Hawken v. Bourne*, 8 M. & W. 703.

TOWNSEND, for the defendant, was not called upon.

PARKE, B. I am clearly of opinion that the defendant Byers was not authorized to pledge the credit of the company

by accepting bills of exchange, without express authority. The *liabilities* spoken of in the deed are those which relate to the price of goods supplied to the mine, or the wages of the workmen. The point is quite settled by the recent cases.

Then there is no evidence of express authority to fix all the defendants, because the defendant James was not present at any meeting at which an authority to accept these bills was given or recognized, and therefore is not bound. There must be judgment of non-suit.

ALDERSON, B., concurred.

ROLFE, B. There is an important distinction in this case, which ought to be strictly observed. A person who authorizes the manager of the mine to pledge his credit for the purposes of the mine, gives him power to bind him, though absent. That authority, however, is a very limited one, and may be exercised without much danger of fraud, or serious injury. But if we are to imply an authority to borrow money from a banker, the banker may advance ten or twenty thousand pounds, and the party may be utterly ruined.

Judgment for the defendants.

See, to the same effect, *Rossiter v. Rossiter*, 8 Wendell, 494; *Savage v. Rix* 9 N. H. 263; *Webber v. Williams College*, 23 Pick. 302; *Taber v. Cannon*, 8 Metcalf, 456.

LYELL AND TELLER V. SANBOURN.

(2 Michigan, 109. Supreme Court, 1851.)

Ratification by partner. When an act is done for the benefit of a partnership, a subsequent ratification of it during the partnership by one of the members, is a ratification by all.

General agency inferred. A general agency may be inferred from facts and circumstances; from the habit and course of dealing.

Judgment not reversed. A judgment will not be reversed for a mere formal error in the proceedings of the court below, which does not affect the merits of the case.

Error to Wayne Circuit Court.

This was an action of assumpsit, brought by the defendant in error, in the Wayne County Court, against the plaintiffs in error, and others impleaded with them.

The declaration contained a count for work and labor done; also for money paid, laid out and expended; and also upon a due-bill, in these words:

“DETROIT, Nov. 2d, 1848.

“Due Stephen Sanbourn two hundred and fifteen 63-100 dollars, payable on demand, being for balance in settlement of Globe Mining Company affairs.”

And was signed,

“EDGAR F. RANDOLPH,
“Sect’y Globe M’g Company.”

Lyell and Teller, two of the defendants below, by A. Davidson, their attorney, appeared and pleaded the general issue. The other defendants in the suit did not appear.

On the trial of the cause in the county court, Edgar F. Randolph, the only witness introduced by either party, was sworn on the part of the plaintiff, and testified in substance: that the defendants in this cause compose the Globe Mining Company; that under that name they were openly and notoriously engaged and jointly interested, in the business of mining in the copper country: That William F. Randolph, since deceased, was the original secretary of the company, but would never serve, and that he (witness) has always been the acting secretary; he was not appointed, but was requested to act, and has always been recognized as the secretary; that since the 29th March, 1847, he has used his own name as acting secretary of the company, and it was notorious and known to all the members, that he was the acting secretary; and that, as such secretary, he made the deposits with defendant Lyell, drew checks on him, made up statements for all the different members, settled all accounts with persons employed by the company, collected and paid out the money, adjusted all balances of accounts, and gave vouchers; that he settled an account with the plaintiff, and gave him a voucher dated 2d Nov. 1848, for \$215.63, which was for the balance of his account, etc., and \$195, which he advanced for the company to pay Littlejohn; the company was indebted to Little-

john to the amount paid by the plaintiff; that in September, 1847, Littlejohn was employed to work for the company, in mining at \$25 per month, and the plaintiff at \$20 per month; that afterward he sent up by Martin Beezue over \$200 in money, to pay off the plaintiff for his work, and directed Beezue to make the best settlement he could with Littlejohn, and gave him general authority on the subject, with the understanding that the company would owe him, or whoever would advance the money to pay Littlejohn; that when Beezue returned he reported a settlement with Littlejohn, and that plaintiff advanced the money to pay him; that he (witness) mentioned everything to a majority of the committee, and that they never dissented; that when the plaintiff came down and presented his account, including the amount paid to Littlejohn, he (witness) recognized the settlement made with him, as he had been in the habit of doing as secretary, and without any dissent; that the payment of Littlejohn by the plaintiff was talked over by several of the company, and Newbold and Teller both said it was as well that way as any; Lyell owned two hundred and fifty shares of the company stock, and he has always had notice of all meetings, signed by himself as secretary, and thinks that Lyell sanctioned the settlement with the plaintiff, as he never dissented; that he always said he would do as the other members of the company did, and always paid all of his assessments until the last; that the plaintiff did not take the due bill as payment; and that Beezue was an agent as far he could give him authority to act, which was given by the advice, and upon consultation with the principal members of the company.

The defendants, Lyell and Teller, introduced in evidence, under objection, the printed articles of association of the members of the Globe Mining Company.

On this evidence judgment was rendered for the plaintiff for \$221.66 damages, besides cost of suit. Defendants, Lyell and Teller, sued out a writ of certiorari, and removed the judgment and proceedings into the Circuit Court for the County of Wayne, where the judgment was affirmed; and they again removed the record into this court by writ of error.

DAVIDSON & HOLBROOK, for plaintiffs in error.

WILCOX & GRAY, for defendant in error.

PRATT, J.

From the record it does not appear that any exceptions were taken, on the part of the plaintiffs in error to any proceeding or decision of the county court in the course of the trial. The main and only question, therefore, to be determined by this court is, whether in view of the law applicable to the case, the judgment is sustained by the evidence. The voluntary association of two or more persons to place their money, effects, labor and skill, or some or all of them, in some commerce or business, with the understanding of sharing the profits thereof, constitutes such persons partners; and it is a fundamental principle of the law of partnership, that if persons suffer their names to be used jointly, in carrying on any kind of trade or business, or otherwise hold themselves out as partners, they are to be considered and treated as such, whatever may be their real relation, as between themselves; and this is strictly just for the simple reason that they may, by thus suffering their names to be used, or by holding themselves out as partners, induce third persons to give them credit or perform services for them which they otherwise could not have obtained. These are principles which have been too often settled, and are too well understood to require any support, by reference either to elementary books or reported cases. As appeared by the uncontroverted testimony of witness Randolph, on the trial in the county court, the defendants below associated themselves together, under the name and style of "The Globe Mining Company," for the purpose of mining copper; and under such association, they as a firm have been actually and somewhat extensively engaged in the prosecution of their mining business. This clearly brings them within the legal rules designated, and renders them partners. How the company stock was divided among them, or whether they were to share the profits arising from the business equally, does not appear, nor is it necessary to institute any inquiry into that

matter, as every partnership imports *ex vi termini* a community of interest, in the profits of the business, and in the absence of all proof to the contrary, the legal presumption is, that they are to share equally: Story on Part. 22 and 30; 3 Kent. Com. p. 28; 6 Wend. R. 263. The defendants being partners, are equally liable for debts and liabilities incurred by the company, during the continuance of the partnership; and in relation to the rights of third persons and creditors of the firm, it is, in legal contemplation, considered as continuing until notice of dissolution: Story on Part. 480; 7 Miss. R. 29; 1 Harris, 161; 22 Wend. R. 183. If the claim of Littlejohn was valid against the company, and of this, it is apprehended, there can be no legal question, it being for services rendered in the prosecution of their legitimate company business, under express contract; and the defendant in error, by the request of the company, paid it, or the company subsequently recognized and ratified the payment thereof, then the liability of the company to the defendant in error, for money paid, clearly and legally follows. And, as to this principle, there can be no real doubt or controversy. The testimony of Randolph, the acting secretary of the company, on this point is explicit; he states that he sent Martin Beezue with over \$200 to pay off the defendant in error for his work, and gave him direction and general authority to make the best settlement he could with Littlejohn, and told him that the company would owe him or anybody else, who would advance the money to pay him; that on Beezue's return, he reported the settlement with Littlejohn, and that defendant in error advanced the money to pay him; all of which he mentioned to a majority of the committee, and to which they never dissented; that he recognized the transaction, as secretary, and as he had been in the habit of doing, with the knowledge of the company, and without any dissent; that the matter was talked over with several of the members, and that Newbold and Teller said it was as well as any way, etc. This testimony clearly constitutes, at least *prima facie* evidence, of a ratification of the transaction; and no matter whether all of the members in terms ratified it or not, if, in fact, Randolph was their general agent in the transaction of their company business, then it was a ratification by all; but whether he was such agent or

not, can not be material in a legal point of view, as the evidence is explicit and certain as to its subsequent ratification by some of the members, and such subsequent ratification by a single member, during the continuance of the partnership, would be sufficient to bind all for the payment of it, each member being principal, as well as general agent for all, within the scope of their partnership business, without notice to the contrary. See the case of *Burgan v. Lyell* and others, decided at this term, on this point, 2 Mich. 102. But was not Randolph in fact the general agent of the company? It is certainly true that he transacted all the business of the company. He kept the accounts, settled all accounts with persons in the employ of the company, collected the money and paid it out, deposited the company's funds and gave the checks for drawing the same out, adjusted balances, gave vouchers, made up statements of the business for all the different members, and gave all notices for meetings of the company; and we hear of no other person acting for the company in the general transaction of their company business, or of any dissent ever being manifested by the company, or any member thereof, to any of these general and continued acts of Randolph. A general agency may be inferred from facts and circumstances—from the habit and course of dealing; and if the facts and circumstances, or the habit and course of dealing, show either an original appointment, or a subsequent and continued ratification of the acts done, it will be sufficient to establish the agency and bind the principal.

In some cases the fact of agency may be inferred from a single act; for instance, a single payment, without disapprobation, of what a servant bought upon credit, has been held to be equivalent to a direction to trust him again: Green, on Ev., §§ 64, 65; Story on Agency, § 55; 1 Carrington & Payne, 60; 5 Ib., 346; 5 Burr. 2686; 1 Overton Tenn. R., 19; 2 Kent Com., 614, 615; 9 Bingham, 19; 10 John R., 38. In the case of *Watkins v. Vince*, 2 Starkie R., 368, it was held that the defendant's son, a minor, having in three or four instances signed for his father, and accepted bills for him, was sufficient *prima facie* evidence of authority to sign a collateral guaranty. And a subsequent ratification of an act done by one assuming to be an agent, relates back and is equivalent to

a prior authority: 12 New Hampshire R., 205. In view of the legal principles established by these cases, there can be no doubt that the evidence in this case is sufficient, *prima facie*, to prove that Randolph was the general agent of the company; and that all of his general and continued acts in the transaction of the company business, have been continually ratified and acquiesced in by the members generally, and without any dissent. Randolph being then such general agent, he was legally authorized to adjust the account of the defendant in error, including the money advanced for the company to pay off Littlejohn, and to give the due-bill in question, in the name of the company, for the same, and which legally binds each and every member for the payment thereof.

The judgment, therefore, is fully sustained by the evidence in the case. This conclusion disposes of all the points made in the case, on the part of the plaintiffs in error, except one, which is, "that the judgment was erroneous, because the default of the defendants below, who were served with process and did not appear, was not entered." This point is clearly not sustainable, as no such practice can be legally required in the county courts. If, on the return of process personally served, the defendant does not appear within one hour after the time for his appearance, the court is required to proceed with the cause, *ex parte*, etc.: R. S. 329, Sec. 16. This same provision is continued in the subsequent act to consolidate the laws in relation to county courts: Sess. L. 1849, p. 275, Sec. 14. But if a different rule of practice prevailed, the counsel for the plaintiffs in error could not avail themselves of a mere formal error in the proceedings in the county court, which does not affect the merits of the case. The error complained of most certainly could affect no one except those who did not appear; and for those, the counsel do not pretend to have appeared in this case.

The judgment of the Circuit Court for the county of Wayne, affirming the judgment of the Wayne County Court, is affirmed by this court with costs.

Judgment affirmed.

WASHBURN V. ALDEN ET AL.

(5 California, 463. Supreme Court, 1855.)

Power of attorney—Promissory note. General words in powers of attorney, are limited and controlled by particular terms and designations. Authority granted by B to A, "to do all acts in his name, concerning their mining operations," followed by the authority to sign B's name to any "company articles," does not authorize A to sign B's name to a promissory note, even where the money was used for the purpose of carrying on their joint mining operations.

Interested witness. A defendant who has suffered a default in suit, upon a note, will not be allowed to testify that he was authorized by his co-defendant to sign the same note, when by so doing he would reduce the amount of the judgment against himself.

Appeal from the District Court of San Francisco County,
Twelfth Judicial District.

The action was brought upon a promissory note, of which the following is a copy:

\$500.

GRASS VALLEY, April 24, 1851.

One day after date, we jointly and severally agree to pay Mowry W. Smith, or order, the sum of five hundred dollars, value received.

SIMON B. HUNT,

SOLOMON E. ALDEN

By his Attorney, Simon B. Hunt,
LLOYD MINTURN.

The note was indorsed by Smith without recourse, and transferred to the plaintiff.

Hunt suffered a default, and Alden answered, denying the execution of the note, and alleging that his name had been signed to it without his authority.

Plaintiff, in order to fix Alden's liability, produced a power of attorney from Alden to Hunt, authorizing him to perform, in Alden's name, all acts concerning certain mining operations, in which he and Hunt were engaged, and also empowering him to sign his name to any company articles.

Plaintiff also offered to prove by Hunt, that Alden had an-

thorized him to sign the note, which testimony the court ruled out. Plaintiff excepted.

It was in proof that the money for which the note had been given, had been used in carrying on their joint mining operations.

The court decreed a nonsuit, and afterward set the order aside and granted a new trial. Defendants appealed.

HAIGHT & GARY, for appellant.

G. P. FOBES, for respondent.

MURRAY, C. J., delivered the opinion of the court. HEYDENFELDT, J., concurred.

This is an appeal from an order setting aside a judgment of nonsuit, and granting a new trial. It does not appear from the record upon what ground the judgment was set aside, and we are therefore led to the conclusion, that it must have been in consequence of some supposed error committed on the trial.

It is a familiar principle, that general words in powers of attorney, are limited and controlled by particular terms and designations. The authority granted by B to A, "to do all acts in his name, concerning their mining operations," followed by the authority to sign B's name to any "company articles," does not authorize A to sign B's name to a promissory note, even where the money was used for the purpose of carrying on their joint mining operations. The authority to sign his name, in this instance, is a limitation upon what might otherwise be considered a general power.

There was no error in excluding the testimony of Hunt; he was a defendant and had suffered a default. If admitted, to prove that he was authorized by Alden to sign the note, he would thereby have reduced the amount of the judgment against himself.

The order granting a new trial is reversed.

**THE CUMBERLAND COAL AND IRON CO. V. SHERMAN,
DEAN AND POSTLEY.**

(30 Barb. 553. New York Supreme Court, 1859.)

Agent can not purchase. A director of a corporation, employed as its agent to examine and report on lands of the company, and advise as to their sale, can not, after examination resulting in the recommendation of a sale, become the purchaser himself, and take a conveyance for his own benefit; and if such purchase is afterward ratified by the stockholders, he must show affirmatively the fairness of the transaction.

Corporation formed by agent. A new company, organized by such agent in which company he is a director and principal stockholder, will take the land, charged with full notice of the facts attending the purchase, and will stand in no better position than the agent who was its grantor.

Corporate officers are agents. A director of a corporation is an agent or trustee, and subject to the obligations and disabilities resulting from that relation.

Option of principal to ratify. The principal may, at its election, adopt a sale so made to its agent, or may have it set aside, without proof of actual fraud.

Substitution. When an agent can not purchase directly from his principal he can not act for another in making such purchase.

Ratification. Facts of the case reviewed, and held not to amount to a ratification.

The plaintiffs are a corporation of the State of Maryland, organized to mine, transport and sell coal, etc. Between February 21, 1855, and May, 1858, Sherman, the principal defendant, was a director in the company. The complaint was filed Dec. 6, 1858, against Sherman, Dean, and the Hoffman Coal Co.; also a corporation of the State of Maryland. Afterward the name of the Hoffman Co. was stricken out as a defendant, and the defendant Postley brought in upon a supplemental complaint.

¹ Although not decided by a court of last resort this case sets forth with great clearness the principles involved in, and the maxims controlling, cases of contracts made by parties between whom exists either a direct or implied relationship of trust. For other cases apparently arising out of the same transaction see *Cumberland Co. v. Hoffman Co.*, 30 Barb. 159; *Cumberland Co. v. Parish*, 42 Md. 598, *Post AGENT*; *Hoffman Co. v. Cumberland Co.*, 16 Md. 456, and *Cumberland Co. v. Sherman*, 20 Md. 117. The last of these cited cases, although in a different State, reads as if it were a paraphrase of the report here printed and reaches the same conclusions.

The complaint alleged that Andrew Mehaffey was president of the plaintiff company from 1854 to 1858, and also acted as treasurer: That Sherman was, in April, 1855, appointed chairman of a committee to prepare by-laws; that the by-laws reported by him were adopted; that under such by-laws an executive committee was to be appointed by the president consisting of three directors; that Sherman was a member of this committee, and took an active part in the affairs of the company, and that such committee assumed to transact most of the ordinary business of the company.

That at a meeting of the board of directors, on the 9th day of October, 1855, Sherman offered a resolution which was adopted, authorizing the president to appoint a committee of five directors, to examine and report on the advisability of selling a part of their lands in Maryland; that Sherman was made one of this committee, and was one of the three who actually visited the lands. The committee advised a sale of 1548½ acres, described by metes and bounds. At the same meeting to which the report was made, it was resolved to accept an offer, should any be made, of not less than \$200,000. At a later meeting, January 15, 1856, it was resolved to accept \$150,000, or about that sum, for a smaller portion of the lands, as it was understood an offer might be had at that amount; that on April 22, 1856, a deed was executed to Sherman and Dean, conveying 1,215 acres for \$140,000, of which \$28,000 was stated in the deed to have been paid to the company, and the balance, \$112,000, by the said Sherman and Dean, assuming to pay 112 bonds of the company for \$1,000 each, the payment of which had been extended to January 1, 1864, with interest thereon, at the rate of six per cent. payable semi-annually. An agreement was also executed on the part of the company, of the same date as the deed, with Sherman and Dean, securing to them important advantages in the use of the railroad and other property of the company. At a meeting of the board of directors, 13th May, 1856, it appears from their minutes, that the president stated that a sale of a certain portion of the lands of the company had been made to Sherman and Dean, and two agreements and the deed for the lands had been executed, and the action of the president and secretary in the matter was unanimously approved.

The complaint charged that the price at which said lands were sold was grossly inadequate, and that no part of the consideration therefor was ever paid to the plaintiffs.

The complaint further charged, that the rates of transportation provided in said contract to be paid by Sherman and Dean, afforded no compensation whatever for the services rendered; that said rates were, in fact, less than actual expenses of the railroad in doing the work, and that every ton of coal transported, according to said rates, was an injury and loss to the plaintiffs.

The complaint further charged, that Melhaffey, the president of the company, falsely and fraudulently stated in his report of June 3, 1856, made to the meeting of the stockholders then held, that the \$140,000, being the consideration of said sale, had been paid in cash; and that he had appropriated \$112,000, part of the proceeds of said sale, to the extinguishment of that amount of bonds of the company, leaving, of the \$467,000 of bonds of the company, \$355,000 as the *entire* debt of the company. That the said Sherman, in connection with the defendant, Postley, and three others, on the 19th of August, 1858, organized a company under the laws of Maryland, for the mining and transportation of coal, called the Hoffman Coal Company; and that on the 20th day of August, 1858, the said Sherman and his wife, and said Dean, conveyed the lands, so conveyed to them by the plaintiffs, by deed dated April 22, 1856, to said Hoffman Coal Company, and had executed, or were about to execute, an assignment to said Hoffman Coal Company of said transportation contract. That said Sherman and Dean became subscribers to 4,990 shares of the capital stock of said Hoffman Coal Company, which capital consisted of 5,000 shares of \$100 each, and that the other ten shares were held nominally by the other persons named, to make them directors. That the company had full notice of all the acts and transactions of Sherman and Dean in obtaining said deed and contract, and that although the same were nominally transferred to said company, Sherman and Dean in fact continued to own the same. Wherefore the plaintiffs demanded judgment, that said deed and contract might be declared fraudulent and void as to them, and that the same be delivered up to be can-

ceeded, and that in the meantime, and until the final hearing of this cause, the said Sherman and Dean be enjoined and restrained from selling or conveying the same; and otherwise as prayed for in the complaint. The supplemental complaint, stated that the defendant, Postley, was president of the said Hoffman Coal Company, and had possession of said deed and contract. That Dean was clerk in an office with the said William Pettet, or in some way connected in business with him; that Dean was a man of little or no pecuniary responsibility; and that he held his interest in said deed, contract; and in the Hoffman Coal Company, in secret trust for some of the directors of the plaintiff, at the time said deed and contract were executed. On the complaint, a temporary injunction was granted, and an order to show cause why the same should not be continued until the hearing of the cause. On this motion, affidavits were read on the part of the defendants, Sherman, Dean and Postley.

All the allegations of fraud charged in the bill were denied. The sale and conveyance to Sherman and Dean were admitted, and the making of the contract for transportation. Sherman and Dean both said they did not know each other till they met to consummate the arrangement, and execute the contract.

There was no denial in opposing affidavits of the charge in the complaint, that the price at which said lands were sold was grossly inadequate. The affidavits alleged that at a meeting of the stockholders on the first of June, 1857, the said sale of lands, and said contract, were ratified by the stockholders, except in some particulars, which were modified at the suggestion of some of the stockholders, by Sherman and Dean. The affidavits did not deny the allegation of the complaint, as to the report made by Mehaffey to the meeting of the stockholders in June, 1856, that the consideration of the deed, being \$140,000, had been paid in cash, and that with a portion of it he had extinguished \$112,000 of the bonds of the company; nor did said affidavits allege that previous to said ratification or approval, the truth in that respect had been communicated to the stockholders, or was known to them. The affidavits allege that Sherman was solicited by several of the stockholders to become the purchaser of said lands, and that

they could not have been sold if he had not been willing to join in the purchase; Sherman stated that he was a man of pecuniary responsibility, but no allegation was made in the affidavits as to the means or responsibility of Dean. There was no denial of the allegations of the complaint as to the formation of the Hoffman Coal Company, of the amount of its capital stock, and of the proportions thereof held by the defendants, Sherman and Dean.

C. A. RAPELLO and S. J. TILDEN, for the motion.

L. R. MARSH and E. W. STOUGHTON, in opposition.

DAVIES, J.

The question presented for my decision is, whether I will dissolve the preliminary injunction granted in the cause, or continue the same till the hearing. If the plaintiffs have made out a *prima facie* case for the relief asked for in the complaint, they are entitled to the remedy asked for; or in the language of § 219 of the code, if it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission of some act, the commission of which during the litigation would produce injury to the plaintiff, a temporary injunction may be granted to restrain such act. The solution of the question depends upon the fact whether or not the plaintiffs have made out an apparent right to the relief demanded. They insist that they have. That it appearing that the defendant Sherman was, at the time he became the purchaser of the lands conveyed by deed of April 22, 1856, and of the privileges and advantages secured by the contract of the same date, the agent and trustee of the plaintiffs, he was incompetent to purchase said land; and by reason of such inability, the plaintiffs have the legal right to have said deed and contract canceled, and the lands reconveyed to them, and be restored to all things which they have lost by reason of the acts of their agent and trustee, in making said sale and contracts. That the defendant Dean is a representative man, having no personal interest in the matter, and that he took ti-

tle and became a party to the contract, knowing the relation of the defendant Sherman to the plaintiffs; and that in fact he paid nothing on account of such purchase, and incurred no liability in reference thereto, beyond uniting with the defendant Sherman, in guarantying 112 bonds of the plaintiffs for \$1,000 each, and assuming the payment of the principal when due, and the interest thereon. That the defendant Postley is the president of the Hoffman Coal Company, and that said company took the conveyance of the lands and the assignment of said contract, with full notice of all the facts and circumstances attending the obtaining them from the plaintiffs. From the facts not denied before me, it appears that Sherman organized the Hoffman Coal Company, in August, 1858, and that he became one of its directors, and he and Dean owned 4,990 shares of the 5,000 shares of its capital stock. It is therefore too clear to need illustration, that whatever knowledge they had of these transactions, the Hoffman Coal Company had. They were its creators; they breathed into it life, and gave it all it had, and owned the whole of it after its creation, and all but a small fragment after; and, therefore, what they knew their creature knew. It is well settled that notice to either of the directors of a bank or company, while engaged in its business, is notice to the principal, the bank: Angell & Ames on Corporations, 299, and cases there cited. So, also, it is well settled, both in law and in equity, that notice to an agent in the transactions for which he is employed, is notice to the principal; and this rule applies as well to a corporation as to a natural person: Same authority. With much more force does the rule apply, when the principal in this case, the stockholders, have full and ample notice. It must therefore be assumed that the defendant Postley, as president of the Hoffman Coal Company, stands in no better position before this court than the other defendants. Next, as to the defendant Dean. It appears from his statement, and that of the defendant Sherman, that the sale, terms, price and all the arrangements, were concluded, and the contract drawn and agreed upon, and all the papers ready for execution, before Sherman and Dean became acquainted with each other; and that acquaintance was first made when they met for the execution of the papers.

It is charged in the complaint that Dean has never paid anything to the plaintiffs on account of said purchase, and that, as alleged in the supplemental complaint and not denied, he is a clerk, and a man of little or no pecuniary responsibility. It would appear that at this meeting to sign these papers, he entered into a guaranty with the defendant Sherman, with whom, before, he was totally unacquainted, to guaranty with him, and did guaranty the payment of \$112,000 of the bonds of the plaintiffs, and the payment of the annual interest thereon for eight years; and which interest amounted in all to the sum of \$53,760. The readiness with which he entered into liabilities to such an amount, with a total stranger, gives countenance to the allegation that he was a man of little or no pecuniary responsibility.

It is also alleged in the complaint, and not denied, that whatever has been paid on account of said purchase money, was paid by the defendant Sherman. I have no hesitation in arriving at the conclusion from all the facts before me, that if Dean entered into these transactions on his own account, he did so with full knowledge of the relation of the defendant Sherman to the plaintiffs; and if he acted as mere agent of others, his principals must have been cognizant of every particular connected with the sale and purchases, if they were not in fact, actors in them. Dean, in his affidavit read on this motion, says: "That he had no acquaintance, consultation or communication with the defendant Sherman, until the bargain was made, and the terms concluded, for the purchase of the said property, conveyed by said deed of 22d April, 1856, and the said transportation contract of same date, nor until the parties came together to have the same executed." Dean denies all fraud on his part, or knowledge that any was perpetrated by the defendant Sherman; but I can not resist the conviction that he knew, and if he acted for others, that they well knew, that Sherman was, at the time, a director of the plaintiffs. The rule in reference to the dealings of an agent or trustee, in reference to property committed to his management or care, is clearly and well laid down by Sir Edward Sugden, in his work on Vendors and Purchasers: 2 Sug. 109, Lond. Ed. of 1824. It is in these words: "It may be laid down as a general proposition, that trustees, unless nominally such to preserve contingent remainders, agents,

commissioners of bankrupts, assignees of bankrupts, solicitors to the commissioners, auctioneers, creditors who have been consulted as to the mode of the sale, or any person who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, *are incapable* of purchasing such property themselves, except under the restraints which will shortly be mentioned. For if persons having a confidential character, were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying upon their integrity.

The characters are inconsistent; *Emptor emit quam minimo potest venditor vendit quam maximo potest.*

Mr. Justice WAYNE, of the Supreme Court of the United States, in *Michoud v. Girod*, 4 How. 554, in delivering the opinion of the court, cites this rule with approbation, and says: "It has been adopted by almost every subsequent writer, and we cite the passage with confidence, having verified its correctness by an examination of all the cases cited by him; by an examination, also, of other cases in the English courts, and of cases in the courts of chancery of several of the States in our Union, sustaining the doctrine, *to the fullest extent*, of the incapability of trustees and agents to purchase particular property, for the sale of which they act representatively, or in whom the title may be for another." He adds in the same case, that "the general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand toward each other. The disability to purchase is a consequence of that relation between them, which imposes on the one a duty to protect interests of the other, from the faithful discharge of which duty, his own personal interests may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the

probability, in many cases, and the danger, in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account, that which his duty or trust requires him to sell on account of another, and from purchasing on account of another, that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or the buyer on his own account, are directly in conflict with those of the person on whose account he buys or sells: 2 Burge's Com. 459. The cases relating to the dealings of an agent or trustee with the property, in reference to which his agency or trust exists, may be arranged in two classes. First. Cases in which a trustee buys or contracts with himself, or several trustees of which he is one, or a board of trustees of which he is one; and it will be seen by reference to authorities hereinafter cited, that the incapacity to purchase applies to all these cases. Second. Cases in which a trustee buys or contracts with his *cestui que trust* who is in *sui juris*, and is competent to deal independently of the trustee, in respect to the trust estate. As to the first class of cases, the purchase or contract is voidable at the option of the *cestui que trust*, without reference to the fairness or unfairness of the purchase or contract. For the reasons before given, the disqualification of the party purchasing or contracting, is a conclusion of law, and is absolute. The leading case in this State, and which has been followed without qualification, so far as I have been able to ascertain, is that of *Davoue v. Fanning*, 2 John. Ch. Rep. 252. In that case, an executor, on making sale of the real estate of his testator, caused the same to be purchased for his wife, and conveyed to her. The sale was made at public auction, and for a fair price, and was *bona fide*. Yet the sale was set aside at the instance of the *cestui que trust*; and it will be observed that the trustee was not the purchaser, but a third person, for the benefit of his wife. Chancellor Kent says, "whether a trustee buys in for himself or his wife, the temptation to abuse is nearly the same. Though the money he was raising was to go to his wife, it was no reason why he should be permitted to buy in for her the *estate itself*. His interest interfered with his duty."

“The case, therefore, falls clearly within the spirit of the principle, that if a trustee, acting for others, sells an estate and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here, *as of course*, and set aside that purchase and have the property re-exposed to sale.” Chancellor Kent then proceeds to review the cases bearing on this point, commencing with that of *Holt v. Holt*, in the time of 22 Car. 2, where it was held that if an executor renew a lease in his own name on its expiration, the renewed lease is to be for the benefit of the *cestui que trust*. And in *Davison v. Gardner*, in 1743, Lord Hardwicke observed, that the court always looks with a jealous eye at a trustee purchasing of his *cestui que trust*; and in *Whelpdale v. Cookson*, in 1747, (1 Vesey 9; S. C. 5 Id. 682,) the Chancellor would not permit a purchase at auction to stand, as he said he knew the dangerous consequence of sanctioning dealings of a trustee with the property of the *cestui que trust*. In *Campbell v. Walker*, 5 Ves. 678, the Master of the Rolls says: “I will lay down the rule as broad as this, and I wish trustees to understand it, that any trustee purchasing trust property, is liable to have the purchase set aside, if, in any reasonable time, the *cestui que trust* chooses to say he is not satisfied with it.” He adds “they must buy with that clog.”

The numerous cases cited by Chancellor Kent, show the uniformity of the rule, not only in the English courts, but in our own and those of our sister States. The rule in this State has been settled by the highest court therein. In *Munro v. Allaire*, 2 Caine's Cases in Error, 183, BENSON, Justice, in delivering the opinion of the court, says:

“It is a principle *that a trustee can never be a purchaser*, and I assume it as not requiring proof that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud, and those dangerous consequences which would ensue, if trustees might themselves become purchasers, or if they were not in every respect kept within compass. Although it may, however, seem hard that the trustees should be the only persons of all mankind who may not purchase, yet, for the very obvious consequences, it is proper that the rule should be strictly pursued, and not in the least relaxed.” Chancellor Kent says that he can not but notice the

precision and accuracy with which the rule and the reason of it are here stated.

Chancellor Kent says that there is one more important case, that of the *York Building Company v. Mackenzie*, decided in the House of Lords in 1795, on appeal from the Court of Session in Scotland. It had then only appeared in 8 Bro. P. C.* by Tom. in App., but has since been reported in 3 Paton, 378.

He says of this case, that it is a complete vindication of the doctrine he was there applying; and he remarks that, considering the eminent character of the counsel who were concerned, and who had since filled the highest judicial stations, and the ability and learning which they displayed in the discussion, it is, perhaps, one of the most interesting cases, on a mere technical rule of law, that is to be met with in the annals of our jurisprudence. He says the reasons of the House of Lords for setting aside the sale are not given, and we are left to infer them from the arguments upon which the appeal was founded. They have now appeared in the eloquent and learned opinions of Lord Thurlow and Lord Chancellor Loughborough. The perusal of these opinions would have satisfied the learned Chancellor that his views of the case, as one of high authority and great interest, were eminently correct. The appellants were an insolvent company, and their estate was sold by the order of the Court of Session, at a public judicial sale, to satisfy creditors. The course, at such sales, is to set up the property at a value fixed upon by the court, which is called the up-set price, and which is founded on information procured by the common agent of the court, who has the management of all the outdoor business of the cause. The respondent in the case was the common agent, and he purchased for himself at the up-set price, no person appearing to bid more; and the sale was confirmed by the court; and in the course of eleven years' possession, he had expended large sums for building and improvements. There was no question as to the fairness or integrity of the purchase. The object of the appellant was to set aside the sale, on the ground that the purchaser was the common agent in behalf of all parties to procure information, and at-

* Page 42.

tend the sale, and was in the nature of a trustee, and so disabled to purchase. On the part of the appellants, it was contended that the sale in question was *ipso jure* void and null, because the respondent, from his office of common agent, was under a disability and incapacity, which precluded him from being a purchaser. The office of common agent, in a ranking and sale; infers a natural disability, which *ex vi termini*, imparts the highest legal disability, because a law which flows from nature being founded on the reason and nature of the thing, is paramount to all positive law. The principle is obvious. He can not be both judge and party. He can not be both seller at a roup and buyer; he can not serve two masters. These views were not controverted by the counsel on the other side; but they insisted the sale could be maintained upon other grounds. After an argument of sixteen days, the case was decided in the House of Lords, opinions being given by Lord Thurlow and Lord Chancellor Loughborough.

Lord Thurlow said, on this point, that all the gentlemen admit that it was the duty of the agent to carry on the sale to the utmost advantage, for the benefit of the creditors, and those interested in the residue; and taking it to be so, one side said: that being your situation, it is utterly impossible for you to perform that duty in such a manner as to derive an advantage to yourself. This seems to be a principle so exceedingly plain, that it is in its own nature indisputable; for there can be no confidence placed, unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it, if you apply an arbitrary rule. In these views the Lord Chancellor concurred, and the sale was set aside. Lord Eldon and Sir W. Grant designate this as *the* great case, and repeatedly refer to it. In *Jeffrey v. Aitken*, decided in June, 1826, the Lord Ordinary observed, it is impossible to hold that the seller can also be the buyer of the subject, after the judgment of the House of Lords in the case of the *York Building Company v. Mackenzie*, decided May 13, 1795.

In *Taylor v. Watson*, decided in Scotland, January 20, 1846, the same rule as laid down in Mackenzie's case was reiterated and adhered to.

Lord Jeffrey said: "The principle involved in this case is a very familiar and general one in our laws; that no person

can be *actor in rem suam*. The stringency of the maxim has been ruled, and held settled by the House of Lords, in the case of Mackenzie. * * * It is now *presumptio juris et de jure*, that where a person stands in these inconsistent relations of both buyer and seller, there are dangers, and it is not relevant to say that it is impossible there could be any in the particular case. I should be sorry to think that any doubts were thrown on this vigorous principle, which has been established both here and in the other end of the island."

In the case of the *Aberdeen Railway Company v. Blaikie*, July 20, 1854 (1 Macqueen's Rep. 461), the House of Lords, reversing the judgment of the court below, held that a contract entered into by a manufacturer, for the supply of iron furnishings to a railway company, of which he was a director, or the chairman at the date of the contract, was invalid and not enforceable against the company. Lord Cranworth, in delivering the opinion of the court, says: "A corporate body can only act by agents, and it is of course the duty of those agents so to act, as best to promote the interests of the corporation, whose affairs they are conducting."

"Such an agent has duties to discharge, of a fiduciary character toward his principal; and it is a rule of universal application, that no one having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have a personal interest conflicting, or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is or may be impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust*, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even, at the time, have been better. But still so inflexible is the rule, that no inquiry on that subject is permitted."

"The English authorities on this subject are numerous and uniform."

The same subject has had a full and careful discussion and examination in the Supreme Court of the United States, in the case of *Michoud v. Girod*, cited *supra*.

The opinion of the court, by Mr. Justice WAYNE, is distinguished for its clear analysis and elaborate review of all the cases bearing on the point. He says: "The rule, as expressed, embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the persons with whom he is dealing, or on whose account he is acting, and his own individual interest." The same rule obtains in the civil law, with some modifications not necessary to notice.

The language of Pothier is distinct and unequivocal: "Nous ne pouvons acheter, ni par nous-mêmes, ni par personnes interposées, les choses qui font partie des biens dont nous avons l'administration." (Tr. du contract de Vente, Part 1 p. 13). The rule of the civil law, without qualification, is adopted in Holland: "Quæ vero de tutoribus cantâ ea quoque in curatoribus pro curatoribus testamentorum, executoribus, aliis similibus qui aliena gerunt negotia, probanda sunt." In Spain the rule is enforced without relaxation, and with stern uniformity. Judge WAYNE, in the case of *Michoud*, in his opinion, cited the rule from the Novissima Recopilacion, in these words: "No man who is testamentary executor, a guardian of minors, nor any other man or woman, can purchase the property which they administer; and whether they purchase publicly or privately, the act is invalid, and on proof being made of the fact, the sale must be set aside." It is thus seen that the rule by which agents or trustees are prohibited and rendered incapable of purchasing or dealing with the property of their *cestuis que trust*, is one of universal application, justified by a current of strong and high authorities, and is adhered to with stern and inflexible integrity; and the consequence of such dealing and purchasing is, that the agent or trustee is liable at any time, on the application of the *cestui que trust*, and as a matter of course, and without reference to the fairness or unfairness of the transaction, the adequacy or inadequacy of the price paid, or any other equities of the agent or trustee, to have the rule set aside; such has been the uniform administration of the law in England, and where the civil

law prevails, and in this country. No reason is suggested why rules thus founded on the soundest morals, which have been maintained with such uniformity and steadiness, should now be relaxed. On the contrary, it is seen that every consideration arising from circumstances surrounding us, and the unparalleled multiplicity of corporations, who can only act by trustees or agents, and the very large proportion of the wealth of the country invested in them, and placed under the control and management of agents and trustees, forcibly demands of courts of justice a firm adherence to these principles, and a stern application of them to every case coming within the sphere of their action.

Nay, the rule, as applicable to managers of corporations, should in no particular be relaxed. Those who assume the position of directors and trustees, assume also the obligations which the law imposes on such a relation. The stockholders confide to their integrity, to their faithfulness, and to their watchfulness, the protection of their interests. This duty they have assumed; this the law imposes on them, and this, those for whom they act have a right to expect. The principals are not present to watch over their own interests; they can not speak in their own behalf; they must trust to the fidelity of their agents. If they discharge these important duties and trusts faithfully, the law interposes its shield for their protection and defense; if they depart from the line of their duty, and waste, or take themselves, instead of protecting, the property and interests confided to them, the law, on the application of those thus wronged or despoiled, promptly steps in to apply the corrective, and restores to the injured what has been lost by the unfaithfulness of the agent. This right of the *cestui que trust* to have the sale vacated and set aside, where his trustee is the purchaser, is not impaired or defeated by the circumstance that the trustee purchases for another. This point is fully discussed by Lord Eldon in *ex parte Bennett*, 10 Vesey, 381. In this case he held, that as the solicitor to a commission of bankruptcy could not purchase at a sale of the bankrupt's effects, for the reasons above stated, so a sale made to a person who had requested the solicitor to employ another at the sale to bid for him, was set aside. He said, "If the principle be that the solicitor can not buy for his own

benefit, I agree when he buys for another, the temptation to act wrong is less; yet if he could not use the information he has for his own benefit, it is too delicate to hold that the temptation to misuse that information for another person is so much weaker, that he should be at liberty to bid for another." He adds: "Upon the general rule, both the solicitor and commissioner have duties imposed on them that prevent their buying for themselves; and if that is the general rule, it follows of necessity that neither of them can be permitted to buy for a third person, for the court can, with as little effect, examine whether that was done by making an undue use of the information received in the course of their duty, in the one case as in the other. No court of justice could institute investigation to that point effectually in all cases, and therefore the safest rule is that a transaction which under the circumstances, should not be permitted, shall not take effect upon the general principle, as, if ever permitted, the inquiry into the truth of the circumstances may fail in a great proportion of cases." And the sale for this reason was set aside. This case is referred to with approbation by Chancellor Kent in *Davoue v. Fanning, supra*. It follows, therefore, that if the defendant Sherman was incapacitated to purchase for himself, he was equally incapacitated to act for the defendant Dean, or any other person, to make the purchase; and on the authority of this case, if Dean was the sole purchaser, the same would be set aside.

There can be no question, I think, at the present time, that a director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge, of a fiduciary nature, toward his principal, and is subject to the obligations and disabilities incidental to that relation: *Robinson v. Smith*, 3 Paige, 222; *Angell & Ames on Corp.*, 258, 260; *Percy v. Milladon*, 3 Louis R., 568; *Hodges v. New Eng. Screw Co.*, 1 R. I. 321; *Verplank v. Merc. Ins. Co.*, 1 Edw. Ch. 84; *Redfield on Railways*, 494; *Benson v. Hawthorne*, 6 Young & Collyer, 326; *The York and North Midland Railway Co. v. Hurlson*, 16 Beav. 485; *Aberdeen Railway Co. v. Blaikie*, 1 Macqueen's Rep. 461.

In the latter case, Lord Cranworth said: "The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by

agents, and it is, of course, the duty of those agents so to act, as best to promote the interests of the corporation whose affairs they are conducting," Says Vice Chancellor McCoun, in the case of Verplanck, *supra*: "But when a corporation aggregate is formed, and the persons composing it, either in virtue of the compact, or by the express terms of the charter, place the management and control of its affairs in the hands of a select few, so that life and animation may be given to the body, then such directors become the agents and trustees of the corporation, and a relation is created, not between the stockholders and the body corporate, but between the stockholders and those directors, who, in their character of trustees become accountable for any willful dereliction of duty, or violation of the trust reposed in them. I see no objection to the exercising of an equity power over such persons, in the same manner as it would be exercised over any other trustees."

Neither are the duties or obligations of a director or trustee altered from the circumstance that he is one of a number of directors or trustees, and that this circumstance diminishes his responsibility, or relieves him from any incapacity to deal with the property of his *cestui que trust*. The same principles apply to him as one of a number, as if he was acting as a sole trustee. It is not doubted that it has been shown that the relation of the director to the stockholders is the same as that of the agent to his principal, the trustee to his *cestui que trust*; and out of the identity of these relations necessarily spring the same duties, the same danger and the same policy of the law. In the language of the plaintiffs' counsel, it is justly said: "Whether it be a director dealing with the board of which he is a member, or a trustee dealing with his co-trustees and himself, the real party in interest, the principal, is absent—the watchful and effective self-interest of the director or trustee seeking a bargain, is not counteracted by the equally watchful and effective self-interest of the other party, who is there only by his representatives, and the wise policy of the law treats all such cases as that of a trustee dealing with himself."

The number of directors or trustees does not lessen the danger, or insure security that the interest of the *cestui que*

trust will be protected. The moment the directors permit one or more of their number to deal with the property of the stockholders, they surrender their own independence and self-control. If five directors permit the sixth to purchase the property intrusted to their care, the same thing must be done with the others if they desire it. Increase of the number of the agents in no degree diminishes the danger of unfaithfulness. *Whichcote v. Lawrence*, 3 Vesey, 740, was a case of several trustees. In this case Lord Loughborough says: "There was more opportunity for that species of management which does not betray itself much in the conduct and language of the party, when several trustees are acting together. I am sorry to say there is greater negligence where there is a number of trustees."

But it is insisted on the part of the defendants, that the purchase was made at the request of some of the stockholders, and that its alleged ratification at the meeting in June, 1857, by the stockholders, is equivalent to a purchase from them; and this brings me to the consideration of the second class of cases, where the trustee buys of, or contracts with, his *cestui que trust*. In reference to them, the presumption of law is against the validity of the transaction, with degrees of strength varying according to the circumstances; but the trustee is permitted to show affirmatively the fairness of the transaction and to establish the other conditions necessary to its validity. The rule on this point is well summed up in the notes to *Fox v. Mackreth* and *Pitt v. Mack* in Vol. 65 Law Library, p. 146.* That the trustee is not under an absolute disability to purchase directly from the *cestui que trust*, but all such transactions are scanned in a court of equity, with the most searching and questioning suspicion, and will not be sustained unless they appear to have been, in all respects, fair and candid and reasonable. The trustee must show that he took no advantage whatever of his situation; that he gave to his *cestui que trust* all the information which he possessed or could obtain upon the subject; that he advised him as he would have done in relation to a third person offering to become a purchaser, and that *the price was fair and adequate*, and the *onus* of proving all this is upon the trustee; and these

* White & T. Lead. Cases, 115, 2 Bro C. C. 400, 2 Cox, 320.

principles apply to all cases where confidence is reposed. To sustain these positions, a large number of authorities are referred to, exclusively American. Taking, therefore, the ground assumed in the argument, that this was a sale in fact, made by the stockholders, the *cestuiss que trust*, does it appear that all these requisites were complied with by the purchaser who stood to them in the relation of confidence? The burthen is on him to establish them, and, if he fails, the sale, though made by the *cestuis que trust*, may be set aside on their application.

Has the trustee shown that he took no advantage whatever of his *cestuis que trust*? That he gave to them all the information which he possessed, or could obtain, in reference to the lands sold to him? I have looked in vain for any evidence that such information as he possessed was communicated to the stockholders. Did he advise them as he would have done if a third person had offered to become the purchaser? No evidence of that character is presented. Has he shown that the price was fair and adequate? He is entirely silent on this point, and by that silence admits the truth of the allegation of the complaint, that the price was grossly inadequate.

I can not, therefore, upon these facts and principles, say that this sale can be upheld, even if it had been made by the *cestuis que trust* directly. But it is said that the stockholders at the meeting of June, 1857, ratified and confirmed the sale and contract. It must be borne in mind, that at this meeting, the stockholders were dealing with their trustee, and that all the duties incumbent on him, when negotiating a purchase from his *cestui que trust*, devolved with equal force on him, when seeking a ratification of a sale made to him by himself as a trustee, with the aid of his co-trustees. I am now regarding the law as applicable to a ratification made by stockholders themselves, or a majority of them; I shall hereafter consider whether a majority of the stockholders made such ratification, and whether it was competent for the majority to make the same, or to bind the minority. The rules as to confirmation of a sale to a trustee by the *cestui que trust*, are concisely laid down in Lewin on Trusts, 97 Law Lib. 402. They are:

“1. The confirming party must be *sui juris*, not laboring under any disability, as infancy or coverture.

2. The confirmation must be a solemn and deliberate act, not, for instance, fished out from some expressions in a letter; and particularly when the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice and so likely to be accompanied with imposition, that the court will watch it with the utmost strictness, and not allow it to stand but on the very clearest evidence.

3. There must be no *suppressio veri*, or *suggestio falsi*, but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case.

4. The confirming party must not be ignorant of the law; that is, he must be aware that the transaction is of such a character that he could impeach it in a court of equity.

5. The confirmation must be wholly distinct from, and independent of the original contract—not a conveyance of the estate, executed in pursuance of a covenant in the original deed for further assurance.

6. The confirmation must not be wrung from the *cestuis que trust* by distress or terror.

7. When the *cestuis que trust* are a class of persons, as creditors, the sanction of the major part will not be obligatory on the rest; but the confirmation, to be complete, must be the joint act of the whole body”—all these positions are sustained by numerous authorities, and are believed to be sound law and of universal recognition.

Applying these principles to the present case, has the party seeking the confirmation of the stockholders to this sale and contract, shown that these essential pre-requisites have been complied with on his part? I do not understand it to be pretended that all the facts and circumstances of the case were made known to the stockholders at this time. It is not asserted that the statement made by Mehaffey to the stockholders, at their meeting in June, 1856, that the whole consideration of this sale, \$140,000, had been paid in money, and that \$112,000 thereof had been applied in the extinguishing of that amount of bonds of the plaintiffs, and which was undeniably incorrect and well calculated to deceive and impose on the stockholders, was in fact untrue and they so understood it.

Can I assume that the defendant Sherman was ignorant of this report and this incorrect statement? If he had knowledge of them, it was clearly his duty, when he sought the stockholders, to obtain from them a confirmation of this sale, to have made them acquainted with the material facts as they truly existed. Not having done so, it was a *suppressio veri*; and whether made designedly or not, is equally fatal, and the confirmation, if obtained, will not avail him. The confirmation must not have been made in *pursuance* of the original transaction, nor under the influence of that transaction (*Wood v. Downes*, 18 Vesey, 125), nor under the same state of circumstances which produced that transaction: *Crowe v. Ballard*, 1 Id. 215. A confirmation given under the idea that the original transaction was valid when it was not, will be set aside: *Roche v. O'Brien*, 1 Ball & Beat, 338; *Gowland v. De Faria*, 17 Vesey, 20; *Dunbar v. Frederick*, 2 Ball & Beat, 317.

It is very doubtful, I think, whether the confirmation or ratification of June, 1857, if made with all the conditions, and under all the circumstances required, was an act either of the corporation or of the stockholders. To make it binding on the former, there must have been, according to the charter, a quorum of the stockholders; and in corporations having stock, each share is deemed a stockholder, and a majority of shares present or represented is a majority of the stockholders. A very large proportion of stockholders represented at that meeting, were there by attorney, and the power given only authorized them to vote for the election of directors. It did not authorize them to bind their principals to acts, and in reference to matters, not authorized or assumed by the power. The ratification or confirmation by such attorneys or agents, having no power to act in the premises, neither bound the corporation nor the stockholders for whom they thus, without any authority, assumed to act.

But even if the confirmation had been legally made, and by a majority of the stockholders, which it clearly was not, when, as in this case, it was to be made by a class, the sanction of a major part will not be obligatory on the rest, but the confirmation to be complete, must be the joint act of the whole body: *Ex parte Hughes*, 6 Vesey, 622; *Ex parte Lacey*, Id. 628; *Ex parte James*, 8 Id. 337; *Davoue v. Fanning*, 2 John. Ch. R. 264.

At the meeting of June, 1857, certain stipulations of the transportation contracts were relinquished by the defendant Sherman, and it is contended that the acceptance of this release bound the corporation and the stockholders to the contracts, and operated as a ratification of the same. What would have been its effect had the defendant, Sherman, stood in the attitude of a stranger to the plaintiffs and the stockholders, it is not necessary to determine. But in view of their actual relations, and in accordance with the principles above stated, as applicable to confirmation in such cases, it can have no binding effect. Sherman in his affidavit, speaks of the release proposed to be given as "his concession or consent to modify" the original transaction. He also says, that when Grosvenor, one of the stockholders, questioned the transaction, he (Grosvenor) admitted that the plaintiffs "had no claim on said Sherman and Dean to change or modify said agreement. * * * And thereupon Sherman consented to make said modification." Mehaffey swears that "he did not contemplate" the subject coming up at the stockholders' meeting in June, 1857; that "on the contrary, he regarded it as having been definitely settled, approved of, and ratified by the stockholders;" that it was brought up by Grosvenor; "that said Grosvenor observed that whilst the stockholders had no claim, and could not claim it as a right, that Sherman and Dean should modify said contract," etc. Riley, a stockholder, who attended the meeting in June, 1857, says that he was not aware, nor does he believe any of the stockholders were aware of their legal right, or that they had any claim to have the deed and contracts, to use his own expression "ripped up;" that no resolution was passed or offered at said meeting approving said contracts and sale.

It is very apparent that no actual ratification or confirmation took place, and I am unable to see that anything was done which would authorize one to be implied. Even if obtained, Sherman was dealing with his *cestuis que trust*, and standing on the original transaction, claiming its validity and binding character; and his *cestuis que trust* believing it so to be, he is debarred, on the authority of the cases already cited, from claiming any benefits from such confirmation, even if it had been made as distinctly and unequivocally as he pretends.

After a most patient investigation of the facts in this case, and the numerous authorities cited in the protracted and very able arguments made by the learned counsel for the respective parties in this cause, I have arrived at the conclusion, entirely clear to my own mind, that their deed of sale and contract can not be sustained.

To hold otherwise, would be to overturn principles of equity which have been regarded as well settled since the days of Lord Keeper Bridgman, in the 22d of Charles second to the present time—principles enunciated and enforced by Hardwicke, Thurlow, Loughborough, Eldon, Cranworth, Story and Kent, and which the highest courts in our country have declared to be founded on immutable truth and justice, and to stand upon our great moral obligation to refrain from placing ourselves in relations which excite a conflict between self-interest and integrity.

I have arrived at this result without considering the question of fraud raised in the complaint, and denied by the answering affidavit. I have chosen to place my decision on higher and more satisfactory grounds. I adopt the language of Lord Eldon in *Ex parte James*, 8 Vesey, 345.

“It rests upon this: that the purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance, as no court is equal to the examination and ascertainment of the truth, in much the greater number of cases.” There may be fraud, as Lord Hardwicke observed, and the party not be able to prove it. To quote Chancellor Kent: “It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at his own option, and, without showing any actual injury, insist upon the experiment of a resale. This is a remedy which goes deep, and touches the very root of the evil. It is one which appears to me from the cases which have been already cited, and from those which are to follow, to be most conclusively established.” The trustee purchased with this clog upon his title, and with a knowledge that his *cestui que trust* might, at his option, in the absence of all fraud, apply within any reasonable time to have the sale vacated.

For the reasons herein stated, I have no doubt such are the rights of the present *cestuis que trust*, the plaintiffs in this suit, and they having established a *prima facie* right to have the deed and contracts canceled, and the lands sold re-conveyed to them, it is my duty to restrain the defendants, until the hearing of this cause, as asked for in the complaint and supplemental complaint.

The plaintiffs have the right to their real estate, or anything into which it has been transmitted. It is therefore proper to restrain the defendant from transferring the stock owned by them in the Hoffman Coal Company, which but represents the real estate of the plaintiffs, and the privileges and advantages secured by the transportation contract.

The motion for an injunction is therefore granted.

New York special term, January 31, 1859. DAVIES, Justice.

BATES V. SIERRA NEVADA LAKE, WATER AND MINING COMPANY.

(18 California, 171. Supreme Court, 1861.)

Striking out part of answer. Upon suit for services under a contract defendant answered that plaintiff had violated his contract and also alleged certain torts by him committed, in slandering the credit of the company. *Held*, that the allegations of tort were properly stricken from the answer.

Notice of termination of contract. Plaintiffs contract was subject to termination on six months' notice being given on either side from any period. *Held*, that the notice contemplated by the contract, was notice from the corporation organized and doing business in California, and not notice of instructions from the committee of the London agency.

Appeal from the Eleventh District.

The complaint alleges that defendant is a corporation under the laws of California; that on March 15th, 1857 he was engaged by certain persons claiming to have authority to come from London, England, to California to take charge

of a part of defendant's works. That thereupon he came to California and here learned that the persons who engaged him had no authority; but that the trustees of defendant at a meeting at San Francisco on June 2d, 1857, engaged plaintiff as their general superintendent, at a salary of \$1,500, with board and lodging; that the contract was "subject to termination on six months' notice being given on either side, from any period;" that plaintiff then entered upon the discharge of his duties and continued therein. That defendant notified him on Aug. 18th, 1859 that his employment would be terminated in six months; that plaintiff continued to discharge the duties of his office until Feb. 18th, 1860; and that defendant is indebted to him in the sum of \$2,696.

The answer denies that plaintiff was employed by the defendant at San Francisco on June 2d, 1857, but alleges that the contract had previously been made by large stockholders in the company, called the London committee, at their meeting in London, April 16th, 1857, and that the San Francisco meeting had simply ratified a previous contract, made by persons who had authority to bind defendant. The answer further alleges that the contract with plaintiff was terminated on June 6th, 1859, by notice given six months previously; but admits his services from May 25th, 1857, when he arrived in San Francisco, until his departure therefrom in September, following, and denies any other services—averring that plaintiff left the employment of defendant, neglected and refused to discharge his duties, etc.; that defendant was compelled to employ in plaintiff's place one Josiah Bates, etc.

"Defendant further answering, avers that plaintiff has not complied with the terms of said contract on his part, but has broken and forfeited the same, and among the many delinquencies and wrong doings on his part, in violation of said contract, defendant enumerates the following, to wit: That during the time that plaintiff ought to have been in the employ of said defendant under said contract, from the —— day of September, 1857, to the —— day of June, 1858, plaintiff left the county of Sierra, in which the property and business of said corporation are situated, and the employment of the defendant, and resided in the city of San Francisco, whereby defendant was greatly injured and damaged; that plaintiff,

during the whole time which he professed to act for and be in the employ of said corporation, was in the habit of circulating false and injurious reports, to the effect that the said corporation was bankrupt and insolvent, and that the same had always been a swindle; for the purpose and with the intent of destroying the credit of said corporation in California, so that he and others might get and obtain the management and control of the property of said corporation by means of forced sales and the like, and that by such means the credit and good name of said corporation were greatly injured and damaged, to wit: in the sum of \$50,000;" that he failed and refused to discharge the duties of his employment, "but on the contrary, was constantly engaged in circulating false and injurious reports about and against the corporation, and in conspiracy with divers other persons, for the purpose of transferring the property of the corporation in California to himself and his co-conspirators, to defraud his employers and the stockholders, and to acquire the management and control of said corporation; that said plaintiff was in the habit, during the time mentioned, of carrying the books and papers of the corporation to Downieville, and consulting lawyers, to obtain information how he could disincorporate said corporation, and take an undue advantage thereof, and turn the same to his own benefit; wherefore, defendant denies that plaintiff ever did or performed any services of any value for said corporation after his departure for San Francisco in September, 1857."

Before the trial, plaintiff moved to strike out those portions of the answer next preceding, and embraced in quotation marks. Motion granted.

The notice to terminate the contract between the parties is as follows:

FOREST CITY, Dec. 6th, 1858.

"MR. BATES:

"*Dear Sir*—In accordance with instructions which I have received from the committee of the London agency, dated fifteenth October last, I hereby give you notice that in six months from this date, the California part of your engagement will terminate with this company. And you are required

at the expiration of that time to return to London and to resume your duties as secretary there.

"I am yours, most respectfully,

"JOSIAH BATES."

This notice was given in obedience to a resolution passed at a meeting in England, of the London committee, Oct. 15th, 1858, to the effect that "on the receipt of these dispatches, Mr. Josiah Bates is authorized to give Mr. Joseph Bates six months' notice of the company's closing their engagement with him in California, in order to require his duties as secretary here."

Plaintiff refused to give up his position under this notice, and on the twenty-third of July, 1859, the secretary of the corporation gave him another notice that the engagement between him and the company should cease in six months. This is the evidence of the secretary, though from the briefs of counsel it would seem that this notice was effected by the board of trustees, ratifying, at a meeting held July 23d, 1859, the previous notice given by Josiah Bates.

The court below found that the notice required by the contract was this latter notice, and accordingly gave judgment for plaintiff for compensation up to January 23d, 1860. Defendant appeals.

STEWART & THORNTON, for appellant.

VANCLIEF & PRATT, for respondent.

BALDWIN, J. delivered the opinion of the court, COPE, J. concurring.

We think the court did not err in striking out the parts of the answer to which objection was taken by the plaintiff. This matter seems to be rather in the nature of a tort than matter showing a violation of contract on the part of the plaintiff. The remainder of the answer, after the expunged portion, was sufficient to let in any proper proof of a violation of the contract by inattention to or neglect of the business of the defendant.

As to the second point, we think the notice contemplated

by the contract was notice from the corporation organized and doing business in this State, and not notice of instructions from the committee of the London agency.

Judgment affirmed.

CAREY V. THE PHILADELPHIA AND CALIFORNIA PETROLEUM COMPANY.

(33 California, 694. Supreme Court, 1867.)

Appointment of agent by corporation—Evidence. In the appointment of their agents, private corporations stand upon the same footing as natural persons, unless limited to some particular mode by their charters; and parol evidence is admissible to prove such agency.

Account stated—Evidence. An account stated is in the nature of a new promise or undertaking, and in this case was properly admitted as written evidence of a contract or obligation on the part of the defendant to pay in gold coin of the United States.

Continuance—Discretion of court. An affidavit for a continuance on the ground of the absence of material witnesses failed to give their names, or to state what was expected to be proved by them. *Held*, that a motion for a continuance based on this affidavit was addressed to the discretion of the court, and that the discretion was not improperly exercised in denying the motion.

Appeal from the District Court of Los Angeles County,
First Judicial District.

GLASSEL & CHAPMAN, for appellant.

V. E. & C. V. HOWARD, for respondent.

By the Court, SHAFER, J.

This is an action upon an account stated, which, as the complaint alleges, was "settled and agreed upon between plaintiff and defendant, July 23d, 1866." It is further alleged that the defendant then acknowledged, in a writing duly signed by him, that the indebtedness ascertained by the account (three hundred and eighty-two dollars and eighty-six

cents) was due and payable in United States gold coin. The case was tried by jury; verdict and judgment for plaintiff.

The appeal is from the judgment and from an order overruling defendant's motion for a new trial. First, to maintain the issue on his part, the plaintiff at the trial offered in evidence the following document:

Philadelphia and California Petroleum Company, Dr.
 May 17th—To Thomas Carey, for wages due him
 as per settlement made with him by Dr. J. Let-
 terman..... \$292 61
 July 23d—To amount due him for wages from May
 17th to date at \$40 per month..... 89 25

Total..... \$381 86

Payable in gold coin (United States) according to contract.

I certify that the above account is correct.

J. D. BATH SHORB,

Superintendent Phil. and Cal. Petroleum Company.

[Internal revenue stamp, twenty cents.] These stamps are affixed this 8th day of December, 1866, by me, and the penalty of fifty dollars received.

C. C. SLOCUM,

Deputy Collector, Second District, California.

The handwriting of Shorb was admitted, and the plaintiff offered parol evidence tending to prove that Shorb acted as the authorized agent of the defendant in signing the certificate affixed to the statement of the account. The evidence was objected to on the ground that the books of the corporation and resolutions of the trustees were the primary proof of the agency if it existed. The objection was overruled and the testimony admitted.

There was no error in this ruling. It is too well settled to admit of argument that private corporations, with regard to the appointment of agents and the making of contracts, are placed upon the same footing as natural persons, unless limited to some particular mode by their charters. In the absence of such limitation they are no more compelled to contract or appoint their agents by deed or resolution than a partnership or other voluntary association: *Bank of United States v. Dandridge*, 12 Wheat. 105; *Smith v. Eureka Flour Mills*, 6 Cal. 6; *San Francisco Gas Company v. City of*

San Francisco, 9 Cal. 472; *Shaver v. Bear River and Auburn W. and M. Co.*, 10 Cal. 400:

It is further insisted that the document in question, admitting that the company was a party to it, was improperly admitted, as having no tendency to prove "a contract or obligation in writing" for the payment of an indebtedness in gold coin.

The paper is on its face an account stated. An account stated alters the nature of the original indebtedness, and is itself in the nature of a new promise or undertaking: *Foster v. Allanson*, 2 T. R. 479; *Holmes v. De Camp*, 1 John. 36. Therefore, an account stated with a new firm may include debts due to a former firm or to one of the partners: *David v. Ellice*, 5 B. and C. 196; *Gough v. Davies*, 4 Price, 200. An action on an account stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of parties. For these reasons we consider that the paper was properly admitted by the court as written evidence of "a contract or obligation" on the part of the defendant to pay plaintiff the sum demanded in this action, in gold coin of the United States.

Second—The defendant, when the case was called for trial, moved for a continuance, on the ground of the absence of material witnesses.

The motion was denied.

The affidavit upon which the motion was based did not state what the defendant expected to prove by the witnesses nor did it even give their names. The application was addressed to the discretion of the court, and we can not say that its discretion was improperly exercised under the circumstances, and much less, that it was abused.

Judgment affirmed.

Mr. Justice SAWYER did not express an opinion.

HARDENBERGH v. BACON & WOODRUFF.

(33 California, 356. Supreme Court, 1867.)

Evidence. H. having alleged that B. was her agent with reference to certain mining property, was properly allowed to show the nature of her claim, though the evidence did not show title in her.

Former recovery no bar, when. A former recovery is no bar to an action, when the causes of action are not the same, though many of the facts in the two actions are identical.

Credibility of witnesses. The testimony being conflicting with regard to the existence of an agency, all questions relative to the credibility of the witnesses are for the court below.

Subject-matter of agency. A claim of title may be the subject-matter of an agency, as well as property to which the title is perfect.

Agent as trustee. An agent who buys the outstanding title to his principal's mining claim, may be treated by his principal as trustee in effecting the purchase and taking the title; he can not act on the subject-matter of his trust for his own benefit.

Proof of agency. An agency for the care of property may be both created and proved by parol.

Rights of agent and agent's partner. B. was the agent of H. with reference to certain mining ground to which H. claimed title. B. was also in partnership with W., and B. & W. purchased the outstanding title to the property. *Held*, that B. & W. took as tenants in common; that B. took an undivided half as trustee for H., his principal, and that W. took the other undivided half in his own right; that W. had the same right to purchase the outstanding title as any other person, and that his partnership imposed no disability upon him in respect to the property.

Title, how passed. The title to mining property, considered as real estate, can pass only by deed or last will and testament. A wish expressed by H. shortly before his death, that his property should go to his mother, was ineffectual to pass the title. A delivery of the possession of the property to the agent of the mother by the holder of the legal title, would at the utmost only be a license, which, until revoked, would justify her entry and receipt of the profits.

Title to mining stock. For a complicated title to mining stock, see facts and opinion.

Specific performance. Each of the shares of stock of a mining company being of equal value, a court of equity will not decree a transfer to plaintiff of the particular shares sued for.

Appeal from the District Court of the City and County of San Francisco, Fourth Judicial District.

This was a suit to compel the defendants to transfer to

plaintiff forty shares of the stock of the Belcher Mining Company, and to account to her for all dividends received by them thereon.

The following are some of the averments in the complaint, to wit:

“Plaintiff further shows, that on or about the 12th day of December, 1861, the said Charles W. Hastings departed this life, and that on the day before, or day of his death, when he was conscious of his approaching death, but whilst he was in the full possession of his reason, and of sound and disposing mind, he, the said Charles W., expressed a wish and desire to make his last will and testament, for the purpose of devising and bequeathing to his mother, the said plaintiff, all of his interest in the said mining claim, to wit: forty feet therein derived by him under the said deed from J. W. Hastings, he, the said Charles W., having previously conveyed five feet of said mining claim to another person; and he, the said Charles W., did then and there say and declare in the presence of his said father, J. W. Hastings, and others, that he did then and there give all of his interest in said mining claim to the said plaintiff, and for the purpose of manifesting this wish and intention more fully, he, the said Charles W., did then and there earnestly request the said J. W. Hastings, and exact a promise at the time from the said J. W., that he would deliver said deed to this plaintiff, and would do everything in his power to carry out the wishes of the said Charles W., and to vest the title to the said mining claim in the said plaintiff, of all of which facts the said J. W. Hastings advised this plaintiff.

“Plaintiff further shows, that on or about the 12th day of April, 1862, she sent her brother, J. A. Dunn, over to what was then the Territory of Nevada, for the purpose of inquiring into, taking possession of, and managing generally, her interests there, and particularly for the purpose of securing for her the said interest of forty feet in the said Belcher mining claim, and he, the said Dunn, acting as her agent, and carrying out the instructions of said plaintiff, called upon the said J. W. Hastings, and received from him, for said plaintiff, the said deed to the said Charles W., and he, the said J. W. Hastings, further intending to carry into effect the said

gift and bequest of said Charles W., to this plaintiff, took the said agent of plaintiff upon the ground of the said Belcher mining claim, and then and there, on or about the 12th day of April, 1862, put the said agent in possession thereof, he, the said J. W. Hastings, declaring to said Dunn at the time, "I give you possession of forty feet of this ground for Maria, (meaning plaintiff); Charlie left it to her, and she shall have it."

The other facts alleged in the complaint are stated in "the findings of fact", of the court below.

The answer of the defendants put in issue all the material facts of the complaint; also by way of special defense, contained the following, to wit:

"And the defendants, further answering, say that by the laws enacted and of force in the Territory of Nevada, at the time of the alleged and pretended gift of the said mining ground, by the said Charles W. Hastings to the said plaintiff, and still in force in the State of Nevada, it was provided that no estate or interest in lands, hereditaments, or possessory rights to the soil, for mining or other purposes, other than for leases for a term not exceeding one year, nor any trust or power over or concerning the same, or in any manner relating thereto, should be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agents, thereunto authorized in writing, and that the said alleged and pretended gift by the said Charles W. to the plaintiff, if the same were true in fact, would be absolutely null and void.

"And, for a further and separate defense to the plaintiff's complaint, the defendants allege that heretofore, on the tenth day of July, 1863, at the June term of this court, the plaintiff herein, and the said J. R. Hardenbergh, alleged herein to be the husband of the said plaintiff, as plaintiffs, impleaded the defendants herein, together with the said J. W. Hastings, as defendants in a certain cause for, and in respect of, the same identical causes of action as are herein by the plaintiffs set forth and alleged against these defendants, and such proceedings were thereupon had in the same cause that afterward, on

the fifth day of August, 1864, by the consideration and judgment of this court, final judgment was entered in favor of the defendants, and against the plaintiffs; and it was ordered, adjudged and decreed that the plaintiffs take nothing by their said proceedings against the defendants, and that the defendants have and recover of and from the plaintiffs their costs and disbursements incurred in the said action, as by the record and proceedings thereof still remaining in this court more fully and at large appears, which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void.

“And for a further and separate defense to the plaintiff’s complaint, the defendants allege, that on the twenty-ninth day of January, A. D. 1863, the mining ground or claim of the Belcher Company was altogether undeveloped, and its actual value unknown; that it had no appreciable market value, and was sold altogether according to the circumstances or caprice of the owners; that its title was unsettled, and especially in this respect, that a certain claim was made against the said company for an undivided fifty feet of the said ground, by one John Murphy; that on the day and year last aforesaid, in the county of Storey, Territory of Nevada, the defendant Woodruff bargained with the said J. W. Hastings of and concerning all the interest which he, the said Hastings, then had in the mining ground of the Belcher Company, whether in his, the said Hastings’, own right, or as the heir-at-law of his son, the said Charles W. Hastings; that the said J. W. Hastings then claimed and pretended to have and to hold in his own right forty-five feet of the said ground, and, as the heir-at-law of his said son, forty other feet of the said ground, and then and there agreed to sell and convey all of the said ground to the said Woodruff, for the sum of two hundred dollars; and thereupon, for and in consideration of the said sum of two hundred dollars, to him then paid by the defendant Woodruff, for himself and the defendant Bacon, the said Hastings made, executed and delivered to the said defendants his, the said J. W. Hastings’ deed of conveyance, whereby he, the said Hastings, purported and pretended to grant, bargain, sell and convey unto the said defendants, an undivided interest of about forty-five feet of the said ground, and de-

scribed the said forty-five feet as being all the right, title and interest in the said Belcher Company's claim then owned or claimed by the said J. W. Hastings in his own individual right; and whereby also, he, the said Hastings, purported and pretended to grant, bargain, sell and convey to the said defendants a further undivided interest of about forty feet of said ground, more or less, and described the said forty feet as formerly owned by Charles W. Hastings, who departed this life at Virginia City, Storey county, about the month of December, 1861, intestate, and without wife or issue, and leaving the said J. W. Hastings his sole heir-at-law. And the defendants further allege, that in truth and in fact, at the time of the execution of the said deed, the said J. W. Hastings had only ten feet of the said mining ground in his own right, instead of forty-five feet, as in and by his said deed alleged and pretended, and the defendants acquired, therefore, by the said deed, only fifty feet of said mining ground; that the said fifty feet, so conveyed to the defendants, were subject to the claim of the said Murphy, above described; that when the defendants demanded the issuance of stock from the trustees of the said Belcher Mining Company, and the title to the said mining ground was examined, the grantees of said Murphy were found to be entitled to the whole of the fifty feet so conveyed by the said Hastings to these defendants, and the defendants were forced to reconvey and deliver the same to the grantees of the said Murphy; that, in fact, the defendants took and received nothing whatever by the said deed of January 29th, 1863; that the said J. W. Hastings had no valid title to the same or any part thereof, either in his own right, or as the heir-at-law of the said Charles W. Hastings.

“ And these defendants deny that the said Belcher Mining Company issued to the defendants forty shares of the stock of the said company, in consideration of the deed, in said complaint alleged, made by the said defendants to the said company; but allege that, on the contrary, the said company altogether rejected the claim made by the defendants, for the forty shares of stock representing the said forty feet of ground, and recognized and admitted the claim of the grantees of the said Murphy to the said forty feet of ground, and issued and delivered to them the forty shares of stock representing the same.”

The cause was tried before the court without a jury. The evidence was more or less conflicting upon all the material facts in issue. The findings of fact and legal conclusions made by the court were as follows, to wit:

“This cause having been tried and fully considered by the court, the following facts are found therein, as having been established by the evidence:

“First—That one J. W. Hastings was the owner of three hundred feet undivided in what was known as the Belcher Mining Company, situate at Gold Hill, in the county of Storey, and then Territory of Nevada.

“Second—That some time in the month of January, 1861, the said J. W. Hastings conveyed forty-five feet of said ground to his son, Charles W. Hastings.

“Third—That Charles W. Hastings conveyed five feet of said ground to one Sarah Palmer, and still retained forty feet thereof.

“Fourth—That Charles W. Hastings departed this life in the month of December, 1861.

“Fifth—That at different times during his last illness, the said Charles W. Hastings expressed an earnest desire that all his property, and particularly his Belcher interest, should go to his mother, the plaintiff in this suit; that said Charles also spoke of making a will, for the purpose of carrying out his wishes, and of vesting the title of all of his property in his mother.

“Sixth—That the said J. W. Hastings told his son, the said Charles, during his last illness, that it was unnecessary for him to make a will, and repeatedly promised said Charles that his wishes should be strictly carried out, and that his mother, the plaintiff in this suit, should have all of his, Charles' property.

“Seventh—That some time in the month of April, 1862, the plaintiff sent her brother, one J. A. Dunn, over to Nevada Territory, for the purpose of looking to her interests there, and, more particularly, to look after the interest which the plaintiff claimed in the said forty feet of Belcher ground, by gift from her son Charles.

“Eighth—That the said J. A. Dunn, in company with the said J. W. Hastings, went upon the Belcher mining claim in

the month of April, 1862, and from thence to the house of Mrs. Barstow, near said claim, and the said J. W. Hastings then and there delivered the deed from himself to Charles, of this ground, to the said Dunn, saying: 'I give you possession of forty feet of this ground for Maria (meaning plaintiff); Charley left it her, and she shall have it.'

"Ninth—That some time in the month of April, 1862, the plaintiff met the defendant Hiram Bacon in the city of San Francisco, and related to him fully in detail all the facts connected with her claim of title to the said forty feet of Belcher ground, and expressed the fear that some one would get the said J. W. Hastings intoxicated, and would swindle her out of her interest in said Belcher ground.

"Tenth—That plaintiff at that time told defendant, Bacon, that she wanted some person to look after her interests over in Nevada, and, more particularly, her said Belcher interest, and pay the assessments, if any became due.

"Eleventh—That defendant Bacon, then and at other times, promised plaintiff that he would take care of her interests, pay assessments, if any became due, and see that she was not swindled out of her interest in said Belcher ground.

"Twelfth—That defendants were partners, dealing in mines and mining stocks, and communicated with each other in respect to all business transactions which were transacted when they were together, but not always in small transactions which were done by them separately; that Bacon was not in Nevada Territory at the time of the purchase by Woodruff, but had left there about a month before.

"Thirteenth—That in the month of January, 1863, the defendant, J. W. Woodruff, applied to J. W. Hastings to purchase of him his, Hastings', interest in the said Belcher ground, and was told by said Hastings that said forty feet belonged to plaintiff, and that he, Hastings, would not sell the same. In all of which defendant Woodruff acquiesced, and said that he only wanted to buy the interest owned by said J. W. Hastings.

"Fourteenth—That the defendant Woodruff had knowledge of the said agency, assumed by his partner, Bacon, for plaintiff.

iff, and also had knowledge of plaintiff's title to said Belcher ground.

"Fifteenth—That the defendants, during the continuance of such agency, acting in bad faith and with intent to defraud the plaintiff, induced J. W. Hastings, in the month of January, 1863, to execute to them a deed for said Belcher ground.

"Sixteenth—That defendants paid no adequate consideration for said forty feet of ground.

"Seventeenth—That the defendants conveyed to the Belcher Mining Company the title to said forty feet of mining ground, and, in consideration thereof, received from said company forty shares of the capital stock of said company.

"Eighteenth—That the defendants have received dividends of said company on said forty shares of stock, amounting to sixteen thousand two hundred dollars, in gold coin of the United States.

"Nineteenth—That the said forty shares of stock in said Belcher Mining Company, and also said dividends, have been unlawfully converted by defendants to their own use.

"Twentieth—That on September 1st, 1864, a certificate for thirty-six and one-half feet was issued to Bacon and Woodruff, and on the 26th of November, 1864, the balance of said forty feet was issued in another certificate.

"The first certificate was transferred by Bacon & Woodruff to Howard Havens, on the 22d of September, 1864; the other certificate was transferred to R. S. Bates, on the 26th of April, 1865.

"Sixty-nine dollars per foot, of dividends, was paid to Bacon & Woodruff, while these certificates stood in their names. On the 24th of January, 1865, the certificate for thirty-six and one-half feet was transferred back to Bacon & Woodruff, and was by them transferred to George Aylesworth on the 17th of April, 1865.

"Four hundred and five dollars per foot, of dividends, have been declared upon the stock of the Belcher Company, from the time of the issuance of the stock to the time of trial.

"That Bacon & Woodruff have at all times held in their names more than forty feet of Belcher stock. That the trans-

fer was made without any particular reference to this stock, and after this suit was brought.

“Twenty-first—That at the time this suit was commenced, March 30th, 1865, the said stock was worth the sum of sixteen hundred and fifty dollars, in gold coin of the United States, per each share, or the aggregate sum of sixty-six thousand dollars in gold coin of the United States.

“Twenty-second—That on the 17th day of April, 1865, the defendants assigned said forty (40) shares of stock to one George Aylesworth, and at that time the same was worth the sum of sixteen hundred and forty-five dollars, in gold coin of the United States, per each share, or the aggregate sum of sixty-five thousand eight hundred dollars, in gold coin of the United States.

“Twenty-third—That the said stock is now worth the sum of three hundred dollars, in gold coin of the United States, per share, or the aggregate sum of twelve thousand dollars in gold coin of the United States.

“Twenty-fourth—That the defendants in this action did recover final judgment against the plaintiff herein, on demurrer to the complaint in the suit of James R. Hardenbergh and Maria Hardenbergh, his wife, against Joseph W. Hastings, Hiram Bacon and J. W. Woodruff, in this honorable court; but the cause of the action, in the said last named suit, is not the same cause of action as in this suit.

“Twenty-fifth—That the purchase of forty feet of Belcher mining ground was made by instructions, consent, and connivance of said Bacon.

“Twenty-sixth—That the title to the forty feet of Belcher mining ground, which the deed from Joseph W. Hastings purported to convey to the defendants, did not fail by reason of any adverse and conflicting claim thereto; and the Belcher Mining Company did not recognize any adverse claim as superior to the title of the defendants, and did not reject the said title of the defendants.

“From the above finding of facts, the court draws the following conclusions of law:

“First—The defendants, Hiram Bacon and J. W. Woodruff, when they procured the conveyance to them from J. W. Hastings, of the said forty feet of Belcher ground, became the

trustees of the plaintiff, and held the same in trust, and for the benefit of said plaintiff.

"Second—The defendants, Hiram Bacon and J. W. Woodruff, having conveyed said ground to the Belcher Mining Company, and having received said forty shares of the capital stock of said company, in consideration of said conveyance, took and held the said shares of stock in trust for, and for the benefit of said plaintiff.

"Third—The plaintiff is in equity entitled to have and receive of the defendants the said forty shares of stock.

"Fourth—The plaintiff is entitled to have and receive of the defendants the dividends paid them by the Belcher Company on said forty shares of stock, amounting to four hundred and five dollars, in gold coin of the United States, per each share, or the aggregate sum of sixteen thousand two hundred dollars in gold coin of the United States.

"Fifth—From the amount of dividends received by defendants on said forty shares of Belcher stock, there should be deducted the amount of any assessments levied by said company and paid by defendants on said forty shares of stock.

"Sixth—The plaintiff is entitled to a decree requiring the defendants to transfer to her within twenty days the said forty shares of Belcher stock.

"Seventh—The plaintiff is not entitled to have and recover from the defendants, the value of said stock at the time this action was brought, or at any other time.

"A decree will be drawn in favor of the plaintiff, in accordance with the above findings and conclusions of law."

Decree was entered accordingly.

The defendants moved for a new trial, and assigned as grounds therefor: First—Insufficiency of the evidence to justify the said several findings of fact, and the judgment. Second—Error in law occurring at the trial. Among others the following, to wit:

On the trial, the defendants objected to any testimony tending to prove the allegations in the complaint of an alleged gift by Charles W. Hastings to the plaintiff, on the ground that the same is immaterial and irrelevant, and because the said alleged gift was invalid and void.

The court overruled the defendants' objections, and admitted

the evidence, to which ruling of the court the defendants then and there excepted, and all of the evidence tending to prove the said allegations of the complaint in that behalf was taken subject to the above objection and exception of the defendants, in all respects, as if the same objection and exception were repeated whenever such evidence was offered.

The court denied the motion, and from the order denying the same, and from the judgment the defendants appealed, and assigned as grounds for reversal on appeal, the same grounds assigned on motion for a new trial.

The plaintiff also appealed to this court from that part, and from so much of the judgment of the district court as denies to plaintiff the right to recover the market value of the forty shares of the stock of the Belcher Mining Company, mentioned in her complaint, instead of the market value thereof at the commencement of the above suit, as claimed by plaintiff.

Both appeals were considered and decided together by this court.

EDWARD J. PRINGLE and QUINT & HARDY, for defendants.

E. W. F. SLOAN and ROBERT F. MORRISON, for plaintiff.

By the Court, RHODES, J.

The objections of the defendants to the plaintiff's evidence do not require particular consideration. The evidence relating to the intended gift of the mining ground by Charles W. Hastings to his mother, the plaintiff, and that in respect to the delivery of the possession of the mining ground by J. W. Hastings, the father of Charles, to Dunn, for the plaintiff, though it may not have shown title in the plaintiff, was sufficient and competent to show the nature of the plaintiff's claim to the property—the matter to which the alleged agency related.

We will first notice the former recovery, which the defendants rely upon as a bar to this action. In that action the present plaintiff, uniting with her husband, set up the same gift and transfer of the possession of the mining ground as are alleged in this, charged that the legal title was in J. W.

Hastings; that Bacon & Woodruff fraudulently acquired the title from him, and it was sought to hold them as her trustees. The defendants demurred, on the ground that the court had no jurisdiction of the subject of the action, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff refusing to amend, final judgment was given for defendants. It is unnecessary to enter into an analysis of the facts in that case, or to inquire into the effect of a judgment on demurrer to the complaint, when there is no issue of fact; and it need only be observed that the agency of Bacon was not alleged; and as it was not alleged it could not have been proven by the plaintiff or found by the court. Had that fact been stated it would have essentially changed the action. In this action the agency is the leading fact, and if that fact had not been averred, or, if averred, had not been found by the court below, the plaintiff must of necessity have failed. Although many of the facts in the former action are identical with those in this, the causes of action are not the same, and, therefore, the former recovery is no bar to this action.

The point upon which counsel have bestowed the most labor, is that of the alleged agency of Bacon. The court found that he took upon himself the agency of the mining ground for the plaintiff, and promised to take care of her interests, pay assessments, if any became due, and see that she was not swindled out of her interests in the mining ground. There was much evidence produced by each party upon this point, and the conflict is very apparent. If the court believed the oral testimony on the part of the plaintiff, the finding of the fact of the agency was inevitable; but if on the contrary the greater credit was given to the testimony of Bacon, the finding must have been against the alleged agency. All questions relating to contradictions among the witnesses, the degree of credit to be given to each, and the probability of the plaintiff's story, when tested by the acts, delays, and conduct of the plaintiff as well as of Bacon, are all for the court below. An agency of the character alleged, may be created by parol, and may be proven in the same manner. The evidence should be clear and satisfactory, but when the agency is fully and explicitly testified to, we can not say that it is not clearly and

satisfactorily proven, because there are contradictions or disagreements among the witnesses.

The subject-matter of the agency was the plaintiff's claim to the mining ground. Where property, or the claim to property, is the subject to which the agency relates, we do not understand it to be requisite that the principal must hold a perfect title, or an equitable title that will enable him to acquire the legal title; and we know of no rule that will prevent the parties from creating an agency which has for its subject-matter a mere naked claim to property. If a perfect title will suffice, and a mere claim will not, where is the line to be drawn between the several grades and characters of title, on the one side of which they will, and on the other side they will not, amount to enough to support the agency? The agency may be created for the very purpose of procuring title, either legal or equitable, and so it may be for the protection of an asserted title, whether well founded or not. Otherwise, the rule forbidding the agent from acquiring an outstanding title for his own use never could have any application when the principal held a legal title; for if the outstanding title was not the true one, its acquisition by the agent could be of no possible injury to the principal; and if it was the true title, the principal could not complain, for his title, not being the true title, amounted to no more than a mere claim.

The principle is elementary, that an agent who is informed of a defect in his principal's title to land, is not permitted to acquire a title for himself, but will be held as a trustee for his principal. This is not denied by the defendants, but several objections are raised to its application in this case, some of which will be noticed. It is said that the purchase was not in the line of the agency; that as Bacon was not her agent to purchase the outstanding title, he can not be held as her trustee in respect to such title when purchased in his own name. The prohibition is not limited in that manner. The agent is not merely forbidden to perform in his own name, and for his benefit, such acts as he is authorized to perform in the name of his principal, but he can not act on the subject of the trust for his own benefit. Here the authority committed to the agent and his undertaking was,

among other things, as found by the court, to take care of his principal's interest in the mining ground; and as any act he might do in acquiring title would have a direct bearing on her interest, she could, at her election, treat him as her trustee in effecting the purchase and taking the title. See *Ringo v. Binns*, 10 Pet. 269; Story on Agency, Sec. 211 and notes.

The doctrine, that when the alleged agency is created by parol, and is denied by the agent, and no part of the purchase money is paid by the plaintiff, the court will not treat the agent as a trustee, holding the title for the plaintiff, is applicable to a case where it is claimed that the agent's authority was to effect the purchase in his own name, but in trust for his principal. The action to compel a conveyance in such case can not be maintained, "because that would be decidedly in the teeth of the statute of frauds: " 2 Sto. Eq. Juris. Sec. 1201 *a*. It has no bearing upon a case like the one at bar, where the agency is to take care of the interests of the principal in the given property. Such agency, as we have remarked, may be both created and proved by parol, and when the agent—it being satisfactorily shown that he is such agent—in violation of the confidence reposed in him, and of his duty, purchases for his own use, an outstanding or adverse title to the property, the principal does not proceed against him as his agent to purchase the property, but on the ground that he occupied such a position of trust and confidence in reference to his principal, that his purchase was fraudulent as against the principal, and therefore may be avoided, or he may, at his election, treat the agent as his trustee, and claim the benefit of the purchase. There is no question in this case in reference to rights growing out of a trust reposed in the agent, to purchase the property in his name for the benefit of the principal, for that trust was not created even by parol; nor any question about the payment of the purchase money by the principal, for that would be inconsistent with the theory that the purchase was in violation of the agent's duty.

The court found that the defendants induced J. W. Hastings to convey to them the mining ground in question. The defendants contend that the evidence shows conclusively that the purchase was made by Woodruff alone, and although

we think the evidence tends more strongly to that conclusion, it will make no difference in the final result, according to the view we take of the case. After the title was taken by them, they held as tenants in common, and there being nothing to indicate a disproportion in their shares, each will be deemed to hold the undivided half. They were partners in their dealings in mining land and stocks, but the title to the mining land did not vest in the partnership, but in the individuals composing the firm. The title could be controlled, and the property itself sold or otherwise administered in a court of equity for the benefit of the partnership, but until such a disposition is made, the legal title remains where their conveyances placed it. The result will be the same, so far as the title to the undivided half that passed to Bacon is concerned whether the negotiation was, in fact, made by both partners, or by Woodruff alone; for if made by him, he was merely the agent of Bacon in respect to the half conveyed to Bacon, and Bacon will be considered for every purpose as the purchaser of that half of the property. That portion of the title, upon the execution of the conveyance by J. W. Hastings to the defendants, became subject to the trust in favor of the plaintiff, she being entitled under the principles of equity in reference to the agency already announced, to treat him as her trustee, holding the title for her use.

Woodruff occupies a position quite different from that of Bacon. He was neither actually nor constructively the agent of the plaintiff. If the interest acquired by him can be reached and controlled for the benefit of the plaintiff, it must be worked out by means of the notice to him of *her rights* in the property. Counsel have discussed at some length the question of notice of the agency of Bacon, but the question has no bearing on the case. He stood in reference to the whole matter of the agency—both the trust and the property to which it related—as would any other third person. The partnership had no connection with the agency, and could not impose any disability upon him in respect to the property; and as any other person, although having full knowledge of the agency, might purchase the outstanding title to the property or any interest therein, Woodruff was entitled to do the same. The only notice that would affect and bind him would

be the notice of the right or title of the plaintiff to the property. The court found that Woodruff "had knowledge of the said agency, assumed by his partner Bacon for plaintiff, and also had knowledge of plaintiff's title to said Belcher ground." It is not found what title she had, but in the findings the evidence is stated showing what was said and done in reference to the property, and upon those matters of evidence the plaintiff's title, at the time of the creation of the agency, depends. It hence becomes necessary to ascertain the nature and extent of the plaintiff's title at that time.

Both parties concede that the claim to mining ground in Nevada, acquired by location, purchase, etc., is treated as real estate, and is subject to the laws governing property of that character. The wish or desire expressed by Charles W. Hastings, shortly before his death, that this property should go to his mother, the plaintiff, was ineffectual to pass the title, and his subsequent death, without having revoked that desire, did not serve to add anything to the words expressed, as a means of passing the title. The title could pass only by deed or last will and testament. The assent of J. W. Hastings to the desire expressed by his son, did not lend it any strength in law, for he then had nothing in the property; and if he had then held any interest in the property, his verbal assent to the wish expressed by the son that the title should be transferred to his mother, would have been a mere nullity. And any statement of his, subsequent to the death of his son, to the effect that the property was the plaintiff's, or that he intended that she should have it, or that he would comply with the wish of his son in that respect, was without effect upon the title, either legal or equitable. Upon the death of Charles the title passed by descent to his father, and this was held by him at the time of the appointment of Bacon as the agent of the plaintiff, unless the matters that transpired between him and Dunn, as the plaintiff's agent, passed some title or interest to the plaintiff.

The court found "that the said J. A. Dunn, in company with the said J. W. Hastings, went upon the Belcher mining claim, in the month of April, 1862, and from thence to the house of Mrs. Barstow, near said claim, and that said J. W. Hastings then and there delivered the deed from himself to

Charles of this ground to the said Dunn, saying: 'I give you possession of forty feet of this ground for Maria, (meaning plaintiff); Charley left it for her, and she shall have it.' " Considering the mining ground as real estate within the proper meaning of that term, it is beyond all question that that ceremony and those words were incompetent and insufficient to pass the legal title. In this State it has frequently been held that the title to a mining claim would pass by a verbal sale accompanied by an actual transfer of the possession: *Table Mountain Company v. Stranahan*, 20 Cal. 198; *Gatewood v. McLaughlin*, 23 Cal. 178; *Patterson v. Keystone Mining Company*, 23 Cal. 576. It is impossible to reconcile those cases with the statute of frauds, except upon the ground taken in the leading case, that "rights resting upon possession only, and not amounting to an interest in the land, are not within the statute of frauds, and no conveyance other than a transfer of possession is necessary to pass them." The doctrine of those cases, however, has no bearing, when the interest held in the mining ground is considered as real estate.

The plaintiff's counsel claim that she held some title in the premises, but they do not undertake to define it, and they speak of the defect in her title, but do not state in what the defect consisted; nor did the court find what title was in her, nor in what respect it was defective. All the title she held, came to her through the acts and declarations of J. W. Hastings at the time he delivered to Dunn the deed he had executed to his son. We do not understand the plaintiff as claiming that thereby the legal title was transmitted to her; for if such was the case, there would be no reason in saying that there was a defect in her title. And besides this, by claiming that the legal title then passed, and that the defendants had notice thereof at the time they took their deed from J. W. Hastings, she would show that she was entitled to no relief in this action, so far as the title was concerned; for if the defendants purchased with notice, they took nothing by their purchase, and their deed would be simply void. Did those proceedings on the part of J. W. Hastings pass to her the equitable title? We can not see how this can be claimed. It certainly was not a contract to be enforced against him, for there is an ab-

sence of a consideration, and of any promise, express or implied. There was nothing in the transaction affecting his conscience that a court of equity could lay hold of, to enforce from him either the legal title, or the proceeds and profits of the mining ground; and it being purely voluntary on his part, the court would not confer upon her any other or greater rights than he had bestowed. The utmost that can be claimed for her is a license, which, until revoked, would justify her entry and receipt of the profits. She would possess no greater right or remedy against a third person bearing no fiduciary relation to her, who took the title from J. W. Hastings, than against Hastings, had he not conveyed the title. She could not demand of him a conveyance of the legal title, nor could she claim the possession or enjoyment of the property, for any time, against his will. There was no title in the plaintiff of which Woodruff can be said to have had notice, and on the case before us, it is impossible to see how he can be charged as her trustee. The title to the undivided half of the mining ground stands unaffected by the agency assumed by Bacon, or the rights and duties growing out of that relation.

The defendants contend that there can be no recovery, in this case; at least that if there is to be any recovery, it must be for only a small portion of the stock sued for, because they say that the Hastings title in a great measure failed; that the stock issued by the Belcher Company on this ground was mostly absorbed in a compromise and settlement of the Murphy title. The evidence upon this point is quite voluminous, but either the parties have not been fortunate in eliciting the testimony with precision and clearness, or the company did not make its arrangements as to the reservation and the subsequent delivery of the stock with the certainty that should characterize such a transaction. We gather from the record, that the company reserved thirty-six feet to meet the claim of the holders of the Murphy title, and the reservation was made against the defendants, as the holders of the last purchase from J. W. Hastings. It also reserved forty feet to answer the claim of the present plaintiff, and this was of course the forty feet in controversy. The president of the company states that the company held the last purchase

responsible for both claims, because they did not wish to make a double reservation. The last purchase from Hastings though calling for eighty-five feet, was held good for only fifty feet, and that was insufficient to respond to both claims, should they be held good. After the termination of the suit above referred to, of Hardenbergh and wife against the present defendants and Hastings, the defendants gave a bond of indemnity against the claim of the plaintiff, and the stock reserved on account of that claim was issued to the defendants. An action was commenced by the claimants of the Murphy title against the Belcher Company, and they obtained judgment in the district court of Nevada, and while the cause was pending on appeal to the Supreme Court of that State, a compromise was effected with the claimants of the Murphy title, by which it was agreed, that Bacon and Woodruff should give them, in satisfaction of their claim, thirty feet of Belcher stock. That stock was immediately issued to Bacon and Woodruff, and was by them delivered to the claimants of the Murphy title. The question arising at this point is, were those thirty shares of stock a parcel of the forty shares issued upon the mining ground in controversy? It does not become material to inquire either as to the validity of the Murphy claim, or upon what portion of the mining ground originally held by J. W. Hastings it became a charge—whether it should have been satisfied out of the fifty feet passing under the deed of Hastings to the defendants, or that which they held through the deed of Hastings to Kelly, or out of both—for the responsibility of the defendants, or either of them, growing out of their connection with the mining ground in controversy, is measured by what they received in consideration of their conveyance of the ground, rather than what they were entitled to receive. From the testimony of the president and secretary of the company, it appears that the bond of indemnity was filed, and the largest part of the stock issued to the defendants on the 1st of September, 1864, and the balance of the forty feet was issued November 26th, 1864. The compromise with the claimants of the Murphy title was effected, and the thirty feet of stock issued to the defendants, and by them delivered to the claimants of the Murphy title, in October, 1864. The thirty feet of stock could not therefore have

been parcel of the forty feet representing the ground that Hastings took by inheritance from his son. The court below did not err, we think, in finding that the Hastings title did not fail, and that the Belcher Mining Company did not recognize any adverse claim as superior to the title of the defendants, and did not reject the title of the defendants.

We see no merit in the plaintiff's appeal. The plaintiff seeks a recovery of the stock, and if that can not be had, that she may recover the value thereof. Since the issue of the stock the defendants have always had forty shares of stock; and as one share is of the same value, and will serve the same purposes in every respect as another, it is of no conceivable interest to the plaintiff to have the particular stock. She is not injured by the transfer of this stock if the requisite amount of stock is transferred to her.

It follows, from the views above expressed, that the decree should have been, that the plaintiff is entitled to a transfer of twenty instead of forty shares of the capital stock of the Belcher Mining Company, together with the dividends paid thereon; and it is ordered that the cause be remanded, with directions to modify the decree accordingly, and to make such orders in reference to the dividends accruing since the entry of the decree as may be meet and proper.

Mr. Justice SAWYER did not express an opinion.

TUFTS V. PLYMOUTH GOLD MINING COMPANY.

(14 Allen, 407. Supreme Court of Massachusetts, 1867.)

Contract construed—Statute of frauds—Coin contract—Measure of damage. T. proposed in writing to the P. G. M. Co. to engage as superintendent of their mines in California for three years, at a stated salary and "expense of passage to the mines." The directors voted to choose him at the salary named, and "to pay his expenses out to California;" they also voted certain rules as to his duties, and required a bond with sureties for faithful performance of his duties. T. gave the bond, received a copy of the rules, went to California and entered upon the duties of his office, from which he was unjustifiably discharged within a year.

Held, that the company were to pay T.'s expenses to the place in California to which they employed him to go. That their vote, signed by their clerk, constituted a contract in writing within the statute of frauds. That the statement in the contract that the salary is payable in specie does not alter the amount due. That he can recover the amount of currency expended in buying gold to pay his expenses. That the measure of damages for breach of contract should be estimated in currency and approximate as nearly as possible to a just compensation for the actual injury sustained, and that it would be a pertinent inquiry where he might be obliged to go to find suitable employment.

Tufts sued the Plymouth Gold Mining Company, a corporation under the laws of Massachusetts alleging that he had been employed as its agent in California for three years, and charging a breach by dismissing him before the end of the first year.

At the trial, the plaintiff put in evidence a record of the following votes by the directors of the corporation at a meeting of date April 28, 1864.

"*Voted*, that we do hereby choose Mr. Alfred Tufts, as agent and superintendent in California, for three years, at a salary of \$2,500 for the first year, \$3,000 for the second year, and \$3,500 the third year, payable in specie; he to be subject to removal by the directors for good and sufficient cause.

"*Voted*, to pay his expenses out to California.

"The agent in California shall, under the direction of the board of directors, have charge of the mine, and all operations in mining there; shall employ and pay all the men needed; shall keep full and accurate accounts of all his receipts and disbursements, and of the business done at the mines and in California, in proper books of accounts; shall send copies of his accounts to the treasurer on the first day of each month. He shall also, on the first day of each month, send the proceeds of the mine to the treasurer, in such way as he shall be directed by the treasurer. He shall by letter, keep the treasurer fully informed of the state of the property and its prospects. He shall report twice in each year the state of the mine, with a schedule of the property and buildings on the same, and the condition thereof, and shall follow the instructions of the board of directors.

"He shall give bond for the faithful performance of his duties, in the sum of ten thousand dollars, with sureties to the satisfaction of the board."

The plaintiff also put in evidence a letter from the treasurer of the company, date June 8th, 1864, inclosing a copy of the above vote in regard to the duties of the agent in California.

On behalf of the defendants, the following proposal of plaintiff to them was put in evidence:

Boston, April 26, 1864.

DIRECTORS OF PLYMOUTH MINING Co.,

Gentlemen: I hereby propose to make an engagement with you, as superintendent for one year, for \$2,500 in specie, and expense of passage to the mines. Or for a term of three years, with an addition of \$500 to the above salary for each succeeding year.

Yours very respectfully,

ALFRED TUFTS.

On the 7th of June, 1864, the plaintiff executed and delivered to the defendants a bond for the faithful discharge of his duties as their agent and superintendent, which they accepted. On June 9th, he received the letter of June 8th, with its enclosures from defendants' treasurer, and on June 13th, sailed with his wife for California, and entered upon the duties of his office as defendants' agent, from which he was discharged by defendants within a year.

The plaintiff testified that he was told of the vote of April 28th, appointing him agent for the term of three years, by one of the defendants' directors, but not by their treasurer on the day of its passage, but never saw any of the votes until the copy was handed to him by the defendants' treasurer with the letter of June 8th, and then only so much as was contained in the copy; that he sailed for California in the employment of the defendants, as their agent and superintendent for three years, and received from them, before he sailed, a ticket for his own passage from New York to San Francisco, but no money, and that no other agreement was made between him and the company than what was contained in the votes of the defendants and the letter of their treasurer.

The defendants, having duly pleaded the statute of frauds as to contracts not to be performed within one year from the making thereof, contended that the plaintiff had not proved any sufficient note or memorandum in writing, signed by the

defendants, or by some person by them lawfully authorized, of the promise, contract or agreement between the parties. But the judge overruled the objection, and instructed the jury that the votes of April 28th, and the subsequent acts of the parties, sufficiently proved a binding contract between them.

By agreement of parties, the only question submitted to the jury was whether the defendants had unjustifiably discharged the plaintiff. The jury returned a verdict for the plaintiff, upon which judgment is to be rendered, unless the ruling upon the statute of frauds entitles the defendants to a new trial.

The question of the rule of damages was reserved for the full court, and it was agreed that the amount of damages should be ascertained by an assessor.

The plaintiff offered in evidence, the statute of California, of 1863, c. 421, and also offered to prove the market value of gold and silver coined money of the United States, in treasury notes of the United States, at the times when his salary had fallen due, and claimed to be entitled to recover the unpaid balance of the salary stipulated in the votes, in gold or silver, estimated at its market value, deducting what he had been able to earn otherwise during the three years mentioned in the votes, and the traveling expenses of himself and wife to California and back, a memorandum of which was produced, showing, among other things, charges for expenses from San Francisco, in California, to the defendants' mines, and offered to show that these expenses were paid as follows, namely: the outward expenses on the Eastern coast in treasury notes; those on the Western coast in gold coin, which he had purchased for the purpose, with a larger nominal sum in treasury notes; the expenses on the return on the Western coast in gold coin which he had received in California on account of salary; and on the Eastern coast in treasury notes, which he bought with such gold coin. All questions of the rule of damages arising in the case were reserved for the determination of the full court.

T. M. HAYES, for the defendants.

T. H. SWEETSER and G. B. BIGELOW, for the plaintiff.

CHAPMAN, J.

The plaintiff proposed to the defendants by letter to engage as their superintendent, for a stated salary "and expense of passage to the mines." They voted to employ him and pay the salary stated by him, and "to pay his expenses out to California." The defendants contend that this was not an agreement to pay his "expenses to the mines." But we think otherwise. He was to go to their mine in California; and the fair construction of their letter, taken in connection with his offer is, that they were to pay his expenses to the place in California to which they employed him to go. Their vote, signed by their clerk, constituted a contract in writing, within the statute of frauds: *Chase v. Lowell*, 7 Gray, 33; *Johnson v. Trinity Church Society*, 11 Allen, 123. The substance of the offer was made known to him, and he, with their knowledge, went out as their agent, to remain for the term of three years. The jury have found that he was unjustifiably discharged before the expiration of the term; and the only remaining questions relate to the damages which he is entitled to recover.

1. As to his salary: the statement in the contract that it is payable in specie does not alter the amount due. The case of *Wood v. Bullens*, 6 Allen, 516, has been too frequently affirmed to require further discussion on this point. See *Howe v. Nickerson*, 14 Allen, 400, and cases cited.

2. As to his expenses in going out: he is entitled to charge the amount of currency expended by him in buying gold to pay these expenses.

3. He is not entitled under the contract to charge the expenses incurred in returning home. If anything is to be allowed in this respect, it is to be included in the damages for the breach of the contract.

4. The damages for the breach of the contract are to be estimated in the currency in which the defendants have a right to pay it. As to the rule of damages, it must be so adapted to the circumstances of each particular case as to approximate as nearly as possible to a just compensation for the actual injury which the plaintiff has suffered: *Revere v. Boston Copper Co.*, 15 Pick. 351. The compensation he was to receive is one of the elements to be considered, for that is the limit of what he would have received if he had been

retained. But no premium is to be allowed upon it because it was payable in specie. But his time was left to him. He was at liberty to dispose of it as he pleased, and he must deduct for it such sum as he might have obtained for it by reasonable efforts. In this view it becomes a pertinent inquiry where he might be obliged to go to find suitable and proper employment. If he was obliged to return home, or go elsewhere, the expenses of removal from the mines to the place of employment become a proper subject of consideration. There are numerous cases on the subject, but all of them vary in their circumstances. The case of *Johnson v. Arnold*, 2 Cush. 46, is unlike this case. Nor is it necessary to discuss cases like that of *Costigan v. Mohawk & Hudson Railroad*, 2 Denio, 609. The rule above stated will be a sufficient guide to the assessor to whom it is agreed to refer the matter.

Judgment on the verdict.

BROWN V. GASTON AND SIMPSON GOLD AND SILVER MINING COMPANY.

(1 Montana, 57. Supreme Court, 1868.)

Service on agent without showing the fact of agency. In a suit against a mining company, the sheriff made the following return of service: "I served the within summons by reading the same to Rodman Carter, and delivering to him a copy thereof; also delivered to him a copy of complaint. All done in Edgerton county, M. T., December 9, 1867." The plaintiff sought to remedy the defective service by filing affidavits of third parties that Carter was managing agent of the company. *Held*, that the usual way of proving service, is by the return of the officer himself, or by the written acknowledgment of the party served. That the attempt to amend service by affidavits of third parties is doubtful practice; but when such parties do not pretend to know that the sheriff served the particular individual described, it is certainly improper practice; and that an affidavit which sets forth that Carter told affiant what position he held in the company, is hearsay testimony.

General agent. Service upon one in the employ of a company, but not its general managing agent, is not sufficient service on the company.

Practice—Vacating judgment—Default set aside. It is not error for the court to sustain a motion to vacate a judgment and set aside a default, and allow the defendant to make answer to the merits of the complaint, when the service of summons is defective.

BROWN V. GASTON AND SIMPSON MINING Co. 377

Appeal from the District Court of Lewis and Clarke County, Third Judicial District.

Brown commenced this action in December, 1867, for services in erecting a quartz mill for defendant, and to enforce his lien as a mechanic therefor. The sheriff served the summons upon Rodman Carter, and made his return, which is stated in the opinion of the court. The clerk of the district court entered the default of the defendant, and a judgment in favor of the plaintiff, and made a minute of these proceedings in the "minute book" of the court, which was approved and signed by Munson, J. On January 11, 1868, the defendant, by its attorney, moved to set aside the default and vacate the judgment. On January 30, 1868, the court, MUNSON, J., made the following order upon this motion:

"In this case I am satisfied the judgment is bad, and can not be held upon the pleadings and papers on file in the case. After argument, counsel for plaintiff asks leave to file affidavits to cure defects, and show that R. Carter, upon whom service was attempted to be made, was the acting agent of said company, with power to accept service. The plaintiff has leave to file said affidavits, and defendants have like leave to file counter affidavits. Said cause is continued one week for such purpose, with stay of proceedings on said judgment for such time, and until further order of this court in the premises."

The plaintiff afterward filed the affidavits of Burdick, King and Cowan, and defendant filed none. Upon reading these affidavits, the court, MUNSON, J., on February 7, 1868, made an order as follows:

"On reading and filing affidavits on behalf of plaintiff herein, under the order of this court of January 30, 1868, and the certificate of the clerk, that no affidavits have been filed by the defendants under said order, and the time allowed in said order for filing affidavits herein having expired, now, on motion of Williams & Burdick, said motion is overruled, and said judgment heretofore entered in the above action stands as the judgment of this court as rendered."

On February 11, 1868, the court, MUNSON, J., made the following order in this cause:

"The January term of this court having, on the 4th day of February, adjourned for the term, and all causes and motions not specially disposed of having been continued till the March term of said court, the order at chambers on the 7th inst. being premature and out of time, the same is hereby revoked and set aside, and said causes and motions therein are continued till said March term of said court for final order in the premises."

On March 6, 1868, the court, MUNSON, J., made the following order on the motion of defendant to open the default, and set aside the judgment for defective service:

"I think the affidavits in the above-named cause, although they do not show all that has been required in similar cases in some States to be good service, yet I will hold them sufficient for that purpose, and let the parties have the benefit of the ruling. Motion allowed, default opened and judgment set aside, with leave to defendants to move to file an answer on or before Monday, March 9, 1868."

The answer of the defendant was filed on March 7, 1868, and alleged that defendant, on February 6, 1868, was adjudged a bankrupt in the District Court of the United States, for the Eastern District of Pennsylvania, under the provisions of the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

The plaintiff appealed from the order of the court, dated March 6, 1868.

This cause, and that of Lamb against the same defendant, *post* 381, were argued together.

SHOBER & LOWRY, H. N. BLAKE, and WILLIAMS & BURDICK, for appellants.

CHUMASERO & CHADWICK, for respondent.

KNOWLES, J.

This was an action against the above named respondents, a corporation organized under the laws of the State of Pennsylvania to carry on the business of mining in this Territory, to foreclose a mechanic's lien.

The sheriff who served the summons made the following return of service thereof:

"I served the within summons by reading the same to Rodman Carter, and delivering to him a copy thereof; also delivered to him a copy of complaint. All done in Edgerton county, M. T., December 9, 1867."

On the 7th day of January, 1868, the appellant claimed, of the clerk of the district court, a default against the respondent, which was duly entered. On the same day, at the request of appellant, the clerk entered up a judgment against respondent for the amount claimed in the complaint, and an order of sale of the described premises. The defendant, within two days thereafter, filed his motion to have the judgment vacated and the default set aside, for the reason, among others, that the service of summons was defective.

The court held, on the hearing of this motion, that the proceedings were defective, but gave the appellant one week in which to file affidavits, showing that Rodman Carter was a general managing agent of the said corporation, the respondent. Affidavits were filed, which the court held were sufficient, and it was ordered that the judgment should stand as the judgment of the court. On the 11th day of February the judge reversed this order, on the ground that it was made out of term time, and that on the adjournment of the court, all causes and motions had been continued for the term. On the sixth day of March following, the court rendered a decision, holding the service good, but, at the same time, setting aside the judgment and default, and giving the respondent time to file his answer.

From this order the appellants appeal to this court.

If there was a good service of summons upon respondent, and a default had been regularly entered, and a judgment thereon, there is no doubt that it was improper practice to allow the respondent, without any showing of excusable neglect or inadvertence, to have the judgment vacated and the default set aside, and leave to file an answer to the complaint. Does the record present such a case? No matter what the reasons which induced the court to sustain the motion may have been, still, if there were legal grounds presented to him which warranted his ruling, it is the duty of this court to sustain it.

It is not contended that the return of the sheriff shows sufficient service of summons to warrant the judgment. The appellant, however, sought to remedy this defect, by filing affidavits of third persons, to show that Carter was a managing agent. When an officer serves a summons, the usual way and we are inclined to say the only way, of proving that service is either by the return of the officer himself, or the written acknowledgment of the party served; the attempt to amend service of summons by the affidavits of persons who did not make the service, is certainly doubtful practice; but when these parties do not pretend to have been present when service was made, or to know that the sheriff did make service on the particular individual described, we are sure it is improper practice. Not one of the persons making affidavits pretend to know that the Carter they are deposing concerning, is the one upon whom the sheriff made service. There is another point connected with these affidavits which strikes us forcibly. One sets forth what Carter told him was the position in the company which he held, which is certainly hearsay testimony. Another deposes concerning the contents of a written power of attorney, which he says Carter told him was sent him by telegraph. It is well, perhaps, he does not depose concerning the signatures to this power of attorney. The third affidavit sets forth certain transactions in which Carter was engaged as the agent of the company. This, however, so far as it is not hearsay, does not show that his agency pertained to all the affairs of the company. If it did not, it has been held that he was not what is denominated a general managing agent, and service upon him would not have been sufficient. Such affidavits, we are of the opinion, are insufficient to amend a return of a sheriff, of service of summons, if such practice be proper.

Where the service of a summons is defective, it is not error for the court to sustain a motion to vacate a judgment and set aside a default, and allow the defendant to make answer to the merits of the complaint.

In accordance with these views, the order of the court below is affirmed, and the cause remanded for further proceedings.

Affirmed.

WARREN, C. J., concurred.

LAMB V. GASTON AND SIMPSON GOLD AND SILVER
MINING COMPANY.

(1 Montana, 64. Supreme Court, 1868.)

Acceptance of service of summons. An attorney in fact for a mining corporation, who is not its general manager, and who has not express authority to appear in suits against it, can not bind the company by accepting service of summons for it.

Practice—Default set aside, when. A defendant who has been properly served with summons, and has suffered a default, should not be allowed to come in and answer without an affidavit of excusable neglect, and of merits.

Appeal from the District Court of Lewis and Clarke county,
Third Judicial District.

The pleadings, motions and orders of the court, MUNSON, J., are the same as in the preceding case.

SHOBER & LOWRY, H. N. BLAKE, and WILLIAMS & BURDICK,
for appellant.

CHUMASERO & CHADWICK, for respondent.

KNOWLES, J.

The facts presented in this case are in the main the same as those of *Brown v. Gaston and Simpson Gold and Silver Mining Company* (*ante*, p. 376). The only difference is the manner in which the respondent was brought into court. In this case R. Carter who, it is claimed was the managing agent of the respondent, a mining corporation, made a memorandum on the complaint, which it is claimed was a waiver of service of summons, in the following words:

“I hereby waive service of summons in this action, and hereby appear as attorney in fact of said company.

“HELENA, Nov. 25, 1867.

“R. CARTER.”

The affidavits and brief filed in this case, and the proceed-

ings subsequent to the signing of this memorandum, are the same as in the aforesaid case of Brown against this respondent. The court below, it would appear, held that this appearance was insufficient, unless it appeared that Carter had authority to appear in this cause for respondent. To establish this fact the appellants filed affidavits to show that he was a general managing agent of the respondent.

The affidavit of Burdick establishes the fact of the genuineness of Carter's signature to the memorandum. But as far as the authority of Carter to appear in the cause is concerned, he only recites what Carter told him. While the evidence of Carter would be sufficient to establish his agency, what he said is incompetent. It is hearsay testimony. The affidavit of Cowan is mostly hearsay testimony. So far as it is not, it shows only that Carter acted for the company in settling his account. This would not be sufficient to warrant him in appearing in an action.

The affidavit of King recites that he had seen a power of attorney to Carter, from respondent, which had been sent him by telegraph. Waiving all objections to the proving of a power of attorney sent by telegraph, he does not state that there was in this any express power to appear in an action against the respondent or any one else. Nor does it show that he was a general managing agent. Carter himself does not, in the memorandum he signed, describe himself as a managing agent, but only as an attorney in fact. An attorney in fact, unless he has express authority to appear in an action, can not do so. The authority for an attorney in fact to appear in a suit must appear within the terms of the grant of power to him, unless he is a general managing agent of a corporation, and then perhaps it would be presumed. The managing agent of a corporation, however, to have this authority, must be one whose powers extend to the whole business of the company, and upon whom service of summons could be made in accordance with the provisions of the statute. Believing that there is not sufficient evidence to establish the fact that Carter was a general managing agent of the Gaston and Simpson Gold and Silver Mining Company, and waiving all objections to the power of attorney which he received by telegraph, it not appearing that he had express authority to

appear in suits against the respondent, we find no error in the ruling of the court below. However, if we believe that the affidavits filed did establish these facts, as the court below seems to, we would hold it improper practice to allow the respondent to have the default set aside, and be permitted to come in and answer without an affidavit of excusable neglect or inadvertence and merits.

We hold, as in the case of *Brown v. Gaston and Simpson Gold and Silver Mining Company*, that in a cause where the manner in which a defendant is brought into court is defective, it is not error to allow him to come in and answer without any affidavit of excusable neglect or inadvertence and merits.

In accordance with these views the order of the court below is affirmed, and the cause remanded for further proceedings.

Affirmed.

WARREN, C. J., concurred.

NORRIS AND FOLTZ V. TAYLOE.

(49 Illinois, 17. Supreme Court, 1868.)

Concealment of facts by agent avoids sale from principal to him.

V., who had a supervisory control over certain mineral lands belonging to T., employed N. to take charge of the lands, collect rents, pay taxes, etc. Developments upon the land justified the belief that it contained rich diggings. N. proposed to V. to purchase the land of T. for \$2,000 and accrued rents. V., acting as N.'s agent for this purpose, purchased the land at \$1,500, but concealed from T. all knowledge of the terms of N.'s offer, and of the increasing value of the land. Upon suit brought to set aside the deed to N., and also a deed from N. to F., who had full knowledge of the transaction, it was *held* that N. was the agent of T., and good faith required him to communicate to T. all important facts relating to the land; that his purchase of the land without so doing was a fraud upon T.; that the sale would be set aside, and that F., having purchased with full knowledge was substantially a party with N.

Appeal from the Circuit Court of Jo Daviess County.

Bill in chancery by Tayloe, to set aside two deeds, one from Tayloe to Norris, for lands in Jo Daviess county, and the other from Norris to Foltz, for an undivided half of the same lands, and for an accounting for mineral and mineral rents both before and after the sale to Norris.

The bill charges that Norris was the agent of Tayloe in the management of the lands, and that in negotiating for their purchase, he did not make such disclosures as it was his duty to do relative to their value, and that he obtained them at a greatly inadequate price.

Decree in favor of Tayloe, and Norris and Foltz appeal.

E. A. SMALL, for the appellants.

D. W. JACKSON, for the appellee.

BREESE, C. J.

Unless it is established that Varnell, in this transaction, was the agent of appellant Norris, this decree can not stand, and to that we have principally directed our attention.

What was the position of these parties? Tayloe, the owner of the land purchased from him by Varnell, was a non-resident, had never seen the land, and knew nothing about it, save through Varnell's statements. Varnell became thereafter, Tayloe's agent, and in answer to the question, "What was the scope of your agency?" he answered, that the list of lands was placed in his hands by Tayloe himself, for the purpose of seeing that the taxes were paid from year to year; that he also had a general supervision, to see that the lands were not trespassed upon, and for this purpose he was empowered by Tayloe to employ other parties in other counties.

On a visit to these lands in the latter part of the spring of 1863, with appellant Norris, he adjusted some difficulties that had arisen between the miners on the land, and made arrangements with Norris to pay the taxes and look after the land. At this time there were several parties digging and prospecting on the land when he was there. Norris himself was then there digging for lead ore. Varnell left the lands in charge of Norris, authorizing him to take general super-

vision of them, and collect the rents as they might accrue. He gave no special power to Norris to grant leases, but told the parties in the presence of Norris, upon the ground, that he, Norris, would have charge and control of the land.

Varnell spent two or three days while on this visit, at the residence of Norris, at Galena, and in the mines, during which Norris proposed to purchase the lands for one thousand dollars, and in addition to that he proposed to purchase jointly with Varnell, which Varnell declined on the ground he had no money; upon which Norris proposed to advance the money, charging Varnell interest upon it until he could repay it. Varnell proposed then to investigate the matter, and after seeing Tayloe, at Washington City, the matter was then dropped. He afterward received a letter from Norris, relating to the same subject.

What followed these preliminaries, is found in the letters in the record. The first is the letter from Varnell to Norris, dated Mt. Vernon, Feb. 12, 1866, in which Varnell asks Norris if he will attend to the taxes of 1865 on this land, and asks him how he progresses with the lead mines; asks him what he will give for the land, and then says: "I think I can buy it at a reasonable rate for you, or any one that may want. Please let me hear from you as soon as possible."

Here was a plain proposition to Norris by Varnell, to become Norris' agent to buy this land. Was this offer accepted by Norris? On the 15th of February, Varnell writes to Norris for an offer for the whole tract, having before inclosed him Foltz's letter proposing to purchase the "forty." He says, Norris shall have the refusal, and wants him to be liberal, and offer at once every dollar he feels like giving for the whole tract, and trusts he can make a big strike and get thousands of dollars worth from it, and then asks, merely for his personal gratification, how much mineral has been taken from the land since the first digging commenced?

On the 14th of March, Norris answered this letter, and proposed to give two thousand dollars for the land and the accrued rents, which then amounted to more than eight hundred dollars, but which he represented at four or six hundred dollars, though no doubt innocently.

To this, on the 23d of March, Varnell responded by letter

from Washington City, that the proposition is accepted. He asks Norris to send him the names of the parties, and the exact description of the land, and when he returns to this State, on the 10th of April, he will bring the deed with him, all right, duly executed, ready for delivery, and tells Norris he can go on as there will be no difficulty.

On the 3d of April, 1866, Varnell again writes Norris from Washington City, acknowledging receipt of a letter of March 27, from Norris, containing a description of the lands, and says he will send on the deed as directed in a few days—that Mrs. Tayloe was sick, but would be all right in a day or so. He further says he has put the consideration at \$1,500 being the amount at which Norris valued the land, and says he had authority to sell at \$1,500, but “the amount I make I desire no one to know.” He says he will be in Virginia until Saturday, when he will start the deed, which will be ready by that time; is glad Norris gets the land, and truly hopes he may do well with it. In a *nota bene* to this letter, he says: “I said nothing to Mr. T. (Tayloe) especially of the late strike. Don’t think he would have sold it if I did, but I really don’t deem it of any great importance. We have spent a good deal on the land, and ought to make something out of it. Though he authorized me to sell at \$1,500, if he knew I obtained \$2,000 he might not feel kindly about it. I have had considerable trouble and loss of time with, and ought to make something out of it, and do not deem the transaction otherwise than as perfectly fair. I would be willing to give the price for the land myself, but I know he would not sell to me.”

There is nothing appearing in the record to show that Varnell was the agent of Tayloe to bargain away this land, except Varnell’s statement in the above letter, nor did he, as this correspondence shows, act as such, but as the agent of Norris to purchase the land for him, he, Varnell, having volunteered to be such agent, as is shown by his letter of February 12, 1866. He was not Tayloe’s agent to sell, but had a supervisory control over the lands, as stated by him in his deposition. The same position was occupied by Norris. He had full charge of the land, and granted privileges in it, and to that extent was the agent of Tayloe. Norris well knew Varnell was not

the agent to sell the land, but he made him his agent to purchase.

What, then, was Varnell's duty under the circumstances? Standing in a *quasi* confidential relation to Tayloe, and at the same time an agent of Norris to purchase valuable property which Tayloe had intrusted to him, it seems one of the plainest dictates of justice and honesty, that Varnell, when negotiating with Tayloe to purchase the property, should have communicated to him all the knowledge he possessed, by the letters of Norris, of the supposed mineral wealth of the land, all of which he studiously withheld, believing, as he says, "it was a matter of no great importance."

At the time the letter of March 14, by Norris to Varnell was written, proposing to give \$2,000 for the land, the survey, which determined most important interests, had not been made, but it was made by the county surveyor about the middle of March, or a few days after the letter of the 14th. That survey developed the fact that a rich lode, not before certainly known to be on that land, was in fact on it, greatly enhancing its value; and even when the letter was written, sufficient developments had been made to justify the belief that the tract contained rich diggings, as in the months of January up to the 23d of March about 90,000 pounds of mineral, and up to April 1st, about 140,000 pounds were raised on it, so that it is very evident, the realities and the prospect together made the land immensely more valuable than the price offered and received, and these facts were known only to one of the contracting parties, Norris, and he acting and standing in a fiduciary relation to the owner, of whom, through Varnell, he purchased at a greatly inadequate price, which on Varnell's own admission, Tayloe would not have accepted had he known the true state of the facts.

We can not but think it was Norris' duty, before he permitted his offer of March 14 to go before Mr. Tayloe, to have communicated fully the result of the survey which was then in the process of execution, and which he could have done in his letter of March 27. By accepting the position of an agent to take charge of this land, collect the rents and royalty, and pay the taxes, a fiduciary relation was thus created in regard to whatever related to the land. Confidence was reposed that

he would act in all things for the interests of his constituent. Good faith required he should have communicated these important facts, developed by the survey, before he permitted his constituent to sell. But even that which was certainly known, that it was mineral land, with flattering prospects, was not communicated by Varnell, his agent, to Tayloe, their common constituent.

As for the other appellant Foltz, it is very evident he had full knowledge of what was going on. Substantially he was a party with Norris in purchasing.

We fail to perceive any error in the record, and must affirm the decree.

Decree affirmed.

THE ATLAS MINING CO. v. JOHNSTON, Guardian, etc.

(23 Michigan, 36. Supreme Court, 1871.)

Discretion of court in rejecting juror not challenged. It is no ground for error that the court set aside two jurors, without any challenge, because upon their examination they did not appear to be entirely impartial, and excused a third who did not fully understand the English language and was partially deaf; especially when no objection was taken to the competency of the jury obtained. The court may in its discretion, reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause.

Contract to pay price in excess of authority—Laches. On November 11th, 1864, an agent of the Atlas Mining Company made an arrangement with Johnston, the plaintiff, to substitute said company as purchaser of certain mining lands at a guardian's sale, in place of another party, the highest bidder, at a price known to plaintiff to be in excess of the authority of such agent. On November 12th, the agent wrote to the officers of the company informing them of the arrangement, and a delay having occurred until January 9th following, owing to a misunderstanding between plaintiff and said agent as to whether or not the deeds and abstracts of title were to be sent to the office of the company in Boston, to be examined before ratification, such papers were on that day so sent, and the officers of the company, by letter from Boston, dated February 13, 1865, declined to ratify the purchase, of which refusal plaintiff was informed by said agent by letter dated March 6th, 1865, *held* in an action of assumpsit for purchase money, that in the absence of any other evidence of ratification or estoppel the company were not liable.

Presumption as to evidence in bill of exceptions. Where a particular point is raised by a bill of exceptions, and evidence is set out in the bill as bearing, or evidently tending to bear, upon that point, it is proper to infer that no evidence was given which would alter the effect of that which is stated.

Error to Houghton Circuit.

The facts are stated in the opinion.

HUBBELL & CHADBOURNE, and NEWBERRY, POND & BROWN,
for plaintiff in error.

DAN. H. BALL and C. I. WALKER, for defendant in error.

CHRISTIANCY, J.

This was an action of assumpsit, brought by Johnston, as guardian of the minor heirs of Polly Vaughn, deceased, against the mining company, to recover the purchase price of certain lands, alleged in the declaration to have been bid off by the defendant at a public sale, made by the plaintiff as such guardian, in pursuance of a license from the judge of probate for Keweenaw county (in the Upper Peninsula), for the sum of twenty thousand five hundred dollars, payable according to the conditions of the sale, six thousand dollars on the delivery of a deed, and the balance in three years. The suit was not commenced till the three years had expired.

The plaintiff below recovered a verdict and judgment in the circuit court for Keweenaw county, for \$27,675, and the defendant brings the case to this court upon a writ of error and bill of exceptions.

The first, second and third errors assigned, are upon the setting aside of two jurors by the court, and the excusing of a third.

The twelve jurors first drawn from the box, being put upon their oaths touching their competency as jurors in the cause, the plaintiff's counsel asked one of them whether he was a brother of the defendant's agent, to which he replied in the affirmative; and being then further asked by the plaintiff's counsel, whether he had talked with his brother about the case, and having answered, "Last night I spoke to him about

it, but he would give me no answer," whereupon plaintiff's counsel interposing no objection, the court nevertheless excused or set him aside; and another juror being drawn, and called to take his place, was asked by plaintiff's counsel whether he had any bias or prejudice in favor of either party, to which he replied, "I have formed some opinion," the court, without any objection from either party, set him aside.

Another juror having been drawn, and called in the place of the latter, before taking his seat, stated to the court that he did not understand the English language; and the court remarking, that from previous intercourse with said juror, he knew that he was deaf, and did not sufficiently understand the English language, excused said juror.

No challenge or objection was taken to any of said jurors by either party. Defendant's counsel, however, claimed the right to examine them touching their competency, but was prevented by the court in the manner above stated, and confined to exceptions to the proceeding. Another juror having been drawn, and called to take the place of the excused jurors, defendant's counsel was asked by the court whether he was satisfied with the jury; to which he replied: "We have no questions to ask the jury."

The counsel for the plaintiff in error (defendant below) insists that defendant was entitled, as matter of right, to have the case tried by the twelve jurors whose names were first drawn from the box, and not challenged peremptorily, or challenged for sufficient cause, and the challenge sustained; and that there was here not only no challenge, but no sufficient ground for a challenge for cause. He relies upon section 4392, Compiled Laws, which provides that "the twelve first persons, who shall appear as their names are drawn and called, and shall be proved as indifferent between the parties, shall be sworn, and shall be the jury to try the cause."

This construction of the statute, we are satisfied, can not be maintained. It would take from the court the power to excuse a juror from sitting in any particular cause, if competent and indifferent, however urgent the cause, but he could only be excused for the term under sections 4389 and 4395.

We think, within the fair meaning of this statute, when compared with the other provisions in reference to jurors and

read in the light of the decisions, that the first two jurors may properly be said not to have been approved as indifferent between the parties. And though it would be ground of error for the court to admit a juror who is challenged and ought to have been rejected, it is no ground of error for the court to be more cautious and strict in securing an impartial jury than the law actually required; and that for this purpose the court may very properly reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause; or, in other words, when the refusal to sustain the challenge would not constitute error. So long as an impartial jury is obtained, neither party has a right to complain of this course by the court; and especially when, as in this case, no objection was taken by either party to the competency or impartiality of the jury which was obtained. We think the court has a discretion in this matter to the extent above explained, and that this discretion was very properly exercised in the present case; and as to the juror who was excused because he did not understand the language, we think it would have been highly improper to have allowed him to sit in the cause, though unchallenged.

Evidence was given on the trial, tending to show that the plaintiff as guardian had been duly licensed to make a sale of the land, and that in pursuance of such license and upon due notice, he sold the same at public auction, October 31, 1864, to one Sanderson, for \$20,500, of which, by the terms proclaimed at the sale, \$5,000 were to be paid down, and the balance in five years; that one Joseph Paul was at that time, and up to the time of the trial, the agent of the defendant company; that he was by said company authorized to bid, and did bid, at the sale, only the sum of \$20,100 on behalf of said company; that his authority and this limitation of it was communicated to the plaintiff on the same day of, but after the sale; that upon examining the statute, it was found to require the payment of one-fourth down, and the balance within three years, which being different from the terms on which the sale was made, Sanderson refused to take the property.

Paul not professing, so far as appears, to have authority to bind the company (defendant), but believing that it would be for their interest to take the property at the sum bid by San-

derson, and to pay the six thousand down, and the balance as the statute required, and that he could induce them to do so, about the 12th of November verbally agreed with the plaintiff and Sanderson to substitute the company for Sanderson as the purchaser, and that the sale should be thus reported by the plaintiff; and the report was so drawn up by the judge of probate, with a knowledge of this arrangement, Sanderson, Paul and the plaintiff, being present before the judge at the time. Plaintiff signed the report thus made, which was confirmed by the judge. In this report, the company was stated to have been the purchaser at the public sale.

There was no evidence in the case tending to show any prior authority of Paul to purchase for the company at any higher price than twenty thousand one hundred dollars. The company, whose office seems to have been in Boston, declined to take the property under this arrangement, or to make payment. And, as the main question in the case is whether there was any evidence tending to show that this arrangement, made by Paul for the purchase in the name of the company, was ratified by them, we set out, in addition to what has already been stated, all the evidence bearing upon this point.

The plaintiff, to prove such ratification, introduced a letter written by Paul to the secretary and treasurer of the company, in Boston, of which the following is a copy:

ATLAS MINE, L. S. Saturday, Nov. 12, 1864.

LUTHER W. CLARK, ESQ., SECRETARY AND TREASURER ATLAS MINING CO.:

Dear Sir: Yesterday, the 11th instant, was the time for the settlement with Mr. Sanderson and Johnston for the purchase of the Vaughn property, and, owing to some misunderstanding as to time for payment, Sanderson refused to take the property, and Johnston called on me last evening, and wanted to know whether or not I would take the place at Sanderson's bid, \$20,500; and at this time I was perplexed to know what to do in the matter; but after thinking the matter over through the night, I made up my mind to secure the place at that figure, for if it was worth to the company \$20,100, the balance, \$400, is but little, and to-day I have the sale transferred to the Atlas Mining Company, and the proposals making out, which will be sent by this mail. I have charged Mr.

Gnlick, who is our attorney here for the company, and also judge of probate for the county, to be sure and have all these papers properly made out, and which no doubt but what he will, as I think he understands his business.

There is no payment to be made until the papers have been submitted to you for your examination, etc., and I hope that my doings in the case will be satisfactory to the board. If it should not be, I can only say that it was not owing to any lack on my part in trying to do what I thought was best for the interest of the company.

Mr. Sanderson suggested the plan to me, to let the thing go, and advertise it over again for sale; but this I do not think a good plan, as I know there is other parties who is anxious to get the place at \$20,000, and I thought it the best way to secure the place at the present time, and till then to run the risk of getting it any less if it should be sold again. Mr. Sanderson can tell you all about it, and which he told me he would do. On receipt of the papers, I hope you will examine them, and let me know what the company will do as soon as possible. The misunderstanding as to the time of payment was this: Johnston said \$6,000 down, and the balance in five years. But in looking up the law in the matter, he found it must not be less than one-fourth of the money down, and the balance in three years.

Yours, etc.,

JOSEPH PAUL.

The record states that "defendants offered evidence tending to show that plaintiff was to send, or cause to be sent, the deed, mortgage to secure deferred payments, abstracts of title, and other papers relating to the sale, to the defendant in the city of Boston, and that defendant was to have until such deed and papers reached them, to determine whether to ratify the act of their agent, and take the property.

"Plaintiff offered evidence tending to show that there was no such agreement. There was evidence tending to show that Joseph Paul, several times after the twelfth of November, requested plaintiff to make out and send the deed and other papers to him to be forwarded to Boston as aforesaid, and that the plaintiff refused to do so, except upon payment of first installment of purchase money, and execution of mort-

gage for the balance, until the 9th of January following, when plaintiff executed a deed of said land, as guardian, to said defendant, and delivered the same with other papers to Paul, to be forwarded to defendant in Boston, plaintiff taking from said Paul the following receipt.

“I hereby certify that James R. Johnston has this day delivered to me a deed, properly executed (description of land), belonging to the minor children of Polly Vaughn, and I am to return said deed unless the consideration mentioned therein, viz.: \$20,500, is paid to him according to the terms agreed on heretofore, and mentioned in the report of sale. This deed being delivered me, merely to obtain the consent of the company, and not to be delivered them absolutely till said terms are complied with. Houghton, January 9th, 1865.

(Signed)

JOSEPH PAUL

“That at the date of this receipt, the deed was delivered to Paul, who at, or shortly after that time, forwarded the same, with the other papers to defendant at Boston; that defendant, by its treasurer, by letter dated February 13, 1865, sent back to said Paul the deed and other papers.”

The following is a copy of so much of the letter as relates to the matter of this purchase:

“OFFICE ATLAS MINING Co. BOSTON, Feb. 13, 1865.

“JOSEPH PAUL, Esq. Agent:

“*Dear Sir:* I return you the papers (deed, bond, mortgage and abstract of title) in reference to the Vaughn estate; as, after mature deliberation, the company have decided not to take the property at the price, and owing to the great depreciation of interest on Lake Superior within the last three months, are not willing to make an offer for it at this time.

“When the company authorized you to bid at the sale, things were very different from what they are at present, and we then expected to have secured the land for about \$10,000. There is no sale for any stocks or interest on Lake Superior now; and when this is the case, it is impossible to collect assessments on non-producing mines, without sacrificing the stock of a majority of those in interest.

“I hope you will not feel much disappointed that we do not take the land. We are all satisfied that you have acted

for the best interests of the company, so far as you could, and I speak for all the board when I say this.

"Should we call an assessment to pay for this land, I am satisfied that one-half of the stock would have to be sold in order to collect the money; this being the case, we could do no other than decline taking it at a price so much higher than we expected to get it for. I find it difficult to collect the last assessment on the 'Atlas,' while drafts have been drawn after we thought we had got through with all expenditure at the mine."

The record further states that "said decision was communicated to the plaintiff by letter, dated March 6, 1865. There was no evidence tending to show that said Paul had any other instructions to purchase said land, than that heretofore mentioned."

This is all the evidence given in the cause, bearing in any way upon the question of the ratification by the company of the purchase as attempted to be made for them by Paul.

Upon a careful examination of this evidence, and of the entire record, we are satisfied that there was no evidence tending to show either any previous authority from the company to Paul, to make the purchase he assumed to make in their name, or that his action, in this respect, was ever ratified by the company. On the contrary, we think it clearly appears that it was the understanding between the plaintiff and Paul, that the latter had no authority at the time to make the purchase he undertook to make, or to bind the company by the attempted arrangement; and that, though both of them hoped and anticipated that the company would approve the arrangement, both acted upon the understanding that the arrangement and the attempted sale would not, and was not expected to bind the company, without its future recognition and ratification, after the whole matter and the papers in reference to it should have been submitted to them for their deliberation; or at least until a reasonable time for such deliberation and decision, after the submission to them of such matters and papers.

This sufficiently appears from Paul's letter of November 12th, introduced by the plaintiff as a part of his case, and of Paul's receipt for the deed, dated January 9th.

And whatever ground (if any) there might have been for

inferring a ratification, if the company after a reasonable time from the reception of the papers, neglected to decide, or to give notice of their disapproval, there was no evidence tending to show that their decision was not made and communicated within a reasonable time after the reception of the papers. There was no evidence touching the time by due course of mail, between the Atlas mine in the Upper Peninsula and Boston, at that season of the year.

But it is urged by the counsel for defendant in error, that the record does not purport to set out all the evidence, and though it states that "there was no evidence tending to show that Paul had any other instructions to purchase than that mentioned," it does not show that he had no other authority. We think the testimony above set forth is a sufficient answer to this suggestion. And where a particular point is raised by a bill of exceptions, and evidence is set out in the bill as bearing, or evidently tending to bear, upon that point, we are bound, unless the contrary in some way appears, to infer that no evidence was given which would alter the effect of that which is stated; since, if there had been such, it was the duty of the counsel on the other side, in settling the bill, to have had it inserted.

We think, therefore, the court erred in charging the jury that "if they should find that the company agreed to be bound by the bid of Sanderson, that said bid was made at a regular public sale, held in pursuance of law after due notice, and the highest bid made at the sale; that the name of the company was substituted in the report of sale by Gulick, at the request and by the consent of the agent of the company, and of the plaintiff, and that the report was so made and executed by the guardian, and confirmed by the probate court, then the company is bound by the bid, in the same manner as if the agent made the bid personally at the sale, provided, the company authorized him to make the bid, or subsequently ratified the act.

This charge assumed that there was evidence before the jury, from which they could properly find that the company authorized him to make the bid made by Sanderson, or subsequently ratified the substitution of the company in the place

of Sanderson, as attempted by Paul, when there was no such evidence in fact.

There being no evidence of such authority by ratification or otherwise, it is unnecessary to consider whether the contract undertaken to be made by Paul, by substituting the company in the place of Sanderson, upon different terms of payment, and Paul's assent to the making and approval of the report, would have been valid, had he possessed the proper authority from his principal. It would be simply preposterous to hold that the report thus made to, and approved by the judge of probate, and assented to by Paul, could in any way bind or affect the defendant, if Paul had no authority thus to bind them, and the defendant did not ratify his action.

Had the terms of the sale been the same, and the substitution of one purchaser for the other been made at the time, or before any circumstances had intervened to affect the price in the meantime, and the authority of the agent was clear, it is quite possible, under the authorities cited by the counsel for the defendant in error, that the sale might be treated, in all respects as one made directly to the substituted purchaser. But where the terms of payment (as in this case) by the substituted purchaser are quite different from those upon which the property had been struck off to the original purchaser, there might, perhaps, be found to be something more than a mere substitution, something in the nature of a new contract, which might require a new sale under the statute to render it valid; but upon this we express no opinion.

The judgment must be reversed with costs, and a new trial awarded.

The other Justices concurred.

WILLIAMS V. THE CHICAGO COAL COMPANY.

(60 Illinois, 149. Supreme Court, 1871.)

¹ **Recoupment—Measure of damages for wrongful discharge.** In an action by a coal company against its former agent, for money had and received, the agent, who was wrongfully discharged before his time, is

¹ See *Tufts v. Plymouth Co.*, ante, 371.

entitled to recoup compensatory damages. But in mitigation of damages, where other employment has been obtained, the extent of compensation received in such other employment may be shown; but if this other employment is a business requiring harder labor and more capital, the damages should not be reduced to the full amount of his earnings, but the amount to be deducted should be left, as a question of fact, for the jury.

Evidence—Matters of privilege. The agent, in order to reduce the amount of his earnings in the other employment, set up a loss sustained by him through one of his customers: *Held*, that the witness was not privileged from disclosing, upon cross-examination, the name of such customer.

Appeal from the Superior Court of Cook County.

This was an action for money had and received, brought by the *Chicago Coal Co. v. Stephen B. Williams*, in the Superior Court of Chicago.

Pleas.—The general issue, and a special plea setting up as matter of recoupment in the nature of a set-off, in substance, that the money sought to be recovered in the suit was for money received by defendant while acting as agent and employe of the plaintiff under a special contract, whereby plaintiff agreed to employ him for the period of five years from the 14th of May, 1866, at a salary of \$2,500 per year, and commissions on all coal sold in Chicago by either party, in excess of 10,000 tons, of ten cents a ton for the first year and five cents a ton for the remaining four years; appellant to be the sole agent in Chicago, to be furnished with yard, office, fixtures, and all help necessary to conduct the business; that appellant was discharged on the 23d of September, 1868, without any fault on his part, and without his consent, whereby he had lost his salary and commissions, and sustained a large amount of damages, to wit, \$10,000, which were due at the commencement of this suit, and of which he offered to set off so much as was sufficient to equal any damages sustained by plaintiff.

Plaintiff filed a general traverse of this plea, and issue was joined.

On the trial, the plaintiff relied chiefly upon correspondence between the secretary of the Coal Company and Williams. The first in the series is written by Rockwell, the secretary, from La Salle, Ill., dated Sept. 26, 1868, to defendant at Chi-

cago, requesting the latter to send his statement of account with the writer up to the 23d inst., together with a list of debts due by the Chicago Coal Co., lately under Williams' charge, and a statement of all money due to the company in connection with the same business.

Williams replied by letter of date Sept. 28, 1868, by which it appears that he inclosed an account current since the last account was rendered; but this account was not introduced in evidence.

Rockwell writes again from La Salle, Oct. 4, 1868, acknowledging the receipt of defendant's letter, with the statement of accounts and asks the following questions: "I notice that S. B. Williams stands credited with \$4,122.77; what does that mean? Under what head is your own salary included, and what is the amount to yourself, to clerks and other employes?"

On Oct. 5, 1868, Williams replies: "The credit to my account arises in this way: My salary was credited up to September 1st, 1868; in making final settlement of the books, I credit myself as follows: debiting expense account for the same, for salary from September 1st, 1868, to May 1st, 1871, two years and five months, at \$2,500 per annum, as per contract, \$6,666.67; also for commissions on coal to be sold, amount of which can not now be ascertained; this leaves the balance now due me from the company, so far as can be determined at this time, of \$4,122.77, the amount referred to in your letter, said amount to be increased by commissions on coal to be sold, as per my contract with your company."

Rockwell again replies to Williams, October 7, 1868, "I have yours of the 5th inst., and notice your explanation of the item of \$4,122.77, concerning which I inquired in my letter, dated 4th inst. You state that you have credited yourself with salary to May 1st, 1871, \$6,666.67. The amount to your credit, as shown by the trial balance, is \$4,122.77. Balance, \$2,543.90. What are the items which constitute this balance of \$2,543.90, and where are they?"

On the 10th October, Williams answers: "In reply to your inquiries as to what constitutes the amount of \$2,543.90 referred to in your letter, I would say, it is principally cash retained by me on account of my claim against the Chicago

Coal Company, the balance of which claim I desire to have paid at your earliest convenience."

Here the correspondence dropped, and these letters constituted nearly all of plaintiff's evidence.

Defendant introduced in evidence the agreement between him and the Coal Company, set out in his special plea, and a letter from Rockwell, dated Sept. 19, 1868, notifying defendant that his connection with the company would cease on the 23d inst.

Defendant testified that at the time he was discharged, he retained \$2,543.90 in his hands, which sum had been reduced by deducting his salary for September, amounting to \$208.33, which, with \$100 he had to pay on a wharfage account, reduced the amount to \$2,235.57, on account of his claim; that when he was discharged he notified the company that he had retained this sum, and why he did so. He also testified, that from the 1st of October, 1868, to May 1st, 1871, he had made in other business, the sum of \$3,282.69. On cross-examination, he testified that he had made a much larger sum, but by losses sustained in the commission business, amounting to \$2,000 or \$3,000, his earnings and receipts had been reduced to the amount stated. Upon being questioned as to the name of the person through whom this loss was sustained, he declined to give the name of the party, whereupon the court decided that he must answer and give the name, be committed for a contempt, or withdraw the matter of the loss from the consideration of the jury. Defendant elected to withdraw the matter of the losses, and the evidence closed, whereupon the presiding judge said:

"There is nothing left now to discuss, is there? I think I am prepared to tell the jury what the verdict ought to be;" and instructed the jury as follows: "Under the evidence, the plaintiff is entitled to recover \$2,604." To which counsel for defendant excepted. The jury retired, and returned into court the following verdict: "We, the jury, find that the plaintiff is entitled to recover \$2,604, including interest." Defendant moved for a new trial, which was denied, and judgment given upon the verdict. Defendant excepted, and brought the cause to this court by appeal.

GEORGE L. WATERMAN and E. A. SMALL, for appellant.

MOORE and CAULFIELD, for appellee.

McALLISTER, J.

The first question presented for consideration is, whether appellant having claimed as witness for himself, to reduce the amount of his earnings in other employment, by losses alleged to have been sustained by him, as a commission merchant, through one of his customers, was privileged from disclosing, upon cross-examination, the name of such customer.

No authorities have been referred to by counsel tending to recognize the privilege in such case. We are aware of none, and regard the negative of the proposition as being too clear, upon principle, to merit discussion.

The only other question in the case arises upon the action of the court at the close of the testimony. It is claimed by appellant's counsel that, as the case then stood, there were questions of fact involved, constituting necessary elements of the verdict, but that the court withdrew all such questions from the consideration of the jury, and peremptorily directed what verdict they should find.

The record shows that, at the close of the testimony, the court said: "There is nothing left to discuss, is there? I think I am prepared to tell the jury what the verdict ought to be." Thereupon the court instructed the jury as follows: "Under the evidence the plaintiff is entitled to recover \$2,604." To which appellant's counsel excepted. The jury returned the following verdict: "We, the jury, find that the plaintiff is entitled to recover \$2,604, including interest." The counsel for appellant moved to set aside the verdict, and to grant a new trial, which was overruled and exception taken.

There was a special plea, setting up matters arising out of the same subject-matter and transaction as the claim of the plaintiff below, in recongment. Such matters grew out of a breach of contract, on the part of the appellee, to employ him at a certain salary, and commissions upon coal to be sold by him, for the period of five years, and wrongfully discharging him before the lapse of that time.

At the close of the testimony, the state of the case was substantially this: appellant was discharged on the 23d of September, 1868, without cause, when his time would not expire until the first of May, 1871. But it appeared from his own testimony that, as early as the first week of October following his discharge, he got employment, or into business, from which he realized more than he was to receive from appellee, if we lay out of the question, the uncertain amount which might be realized as commissions upon coal, which he might sell in excess of a specific amount, as to which the evidence shows little, if any, data; that he continued to receive such compensation or profits in his other employment, as that, at the expiration of the time for which he was employed by appellee; he would probably have received as much, if not more than his salary would have amounted to, if he had continued under the contract with appellee. If he had received as much in other employment, of the same character, then of course, the damages sustained by his wrongful discharge might be but nominal. But he claimed to reduce the result of his earnings and income, below what his salary from appellee would amount to, by showing losses to which he had been subject; but upon the question arising concerning the privilege above referred to, he, rather than disclose the name of the customer through whom the loss was sustained, elected to withdraw all evidence of such loss. It is probable that, upon this being done, the court regarded the defense by way of recoupment, foreclosed by appellant's admission of the amount received by him in other business, and that no question of fact remained to be passed upon.

Would such a result necessarily follow?

Where a party is employed for a specified time, and at a stated salary, in a business of one character, and he is wrongfully discharged, does it follow that if he goes into another kind of employment, or, by the use of his capital and skill, both combined, he makes as much as he would have received under the employment from which he was discharged, he has therefore necessarily sustained no damages?

The principle upon which damages are allowed in cases like this, is that purely of compensation. New employment does not constitute a defense, but the amount earned is to be

taken into consideration in determining how much the party discharged has lost; or perhaps as a better expression, in mitigation of damages. The law will not permit him to so conduct himself as to aggravate the damages. He must not lie idle when it is practicable to get work of the same general character.

But when other employment has been obtained, and earnings received, or business entered into and profits made, and the question arises as to how much damages such party has sustained by reason of the wrongful discharge, some questions of fact must necessarily be involved, viz.: Was the new employment of the same general character, or was the labor more severe, or the responsibility greater or less? Was the new business such as required the use of capital, while that from which he was discharged did not? If a young man should enter into a contract with a merchant, to act as his clerk for a specified time, at a stated salary, and be wrongfully discharged, and if the only employment he could get, would be to work as brakeman on railroad trains, would it be claimed that because he received as much wages as brakeman as he was to receive as clerk, such facts would constitute a defense to the merchant? Would they, as matter of law, operate as mitigation of damages, to such as were nominal merely? Clearly not; simply because the question of fact should be passed upon whether the labor was not different in character and more severe in the performance.

The matter set up in the special plea is in the nature of a cross-action. Suppose, instead, appellant had brought his action upon the contract, alleging the same breach. Proof upon the trial of the execution of the contract, readiness to perform on the part of appellant, and the wrongful discharge, would constitute a cause of action which would entitle him to some damages. But suppose the same evidence were introduced as to subsequent employment, and the receipt of compensation, which, nominally, amounted to as much and even more than the stipulated salary, would it be competent for the court to take the case from the jury and instruct them peremptorily to find for the defendant? Manifestly it would not; and yet that is precisely what was done, in effect, in this case.

The appellant testified, and is uncontradicted, that at the time he was discharged, he retained, and so reported to appellee, the sum of \$2,543.90, which had been reduced by deducting the September salary of \$208.33; that he was obliged to allow Mr. Hart \$100 in the settlement on a wharfage account, which, with the September salary, reduced the amount received by him to \$2,235.57.

It does not appear that appellee had ever questioned the allowance of the salary for September, or of the \$100 paid on the wharfage account. It was questionable whether these items should have been allowed; the matter should have been submitted to the jury.

Against appellant's evidence on the trial was this letter of October 10, 1868, to Rockwell, in answer to one of the latter. Rockwell says in his letter:

"You state that you have credited yourself with salary to May 1st, 1871,.....\$6,666.67

"The amount to your credit, as shown by the trial balance, is..... 4,122.77

"Balance,..... \$2543.90

"What are the items that constitute this balance of \$2,543.90, and where are they?"

In his reply to these inquiries appellant said:

"In reply to your inquiries as to what constitutes the amount of \$2,543.90, referred to in your letter, I would say, it is principally cash retained by me on account of my claim against the Chicago Coal Company," etc.

Unless this admission amounts to an absolute estoppel, which it clearly does not, the appellant had the right to claim before the jury that this amount should be reduced by the items above referred to in his testimony; and the question should have been submitted to the jury.

Then, again, the question of interest was for the jury, and not for the court. The suit was for money received to the use of another, it is true, but appellant testified, and in that was uncontradicted, that he immediately notified the company of the fact, and his reasons for so doing. In such case, the statute gives interest when such money is "retained without the owner's knowledge." And the only other case where the stat-

the gives interest in the absence of a written contract or judgment, is "on money withheld by an unreasonable and vexatious delay of payment." Whether the interest be claimed upon one ground or the other, the question must be submitted to the jury.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

CONSOLIDATED GREGORY CO. v. RABER.

(1 Colorado, 511. Supreme Court, 1872.)

Agent's power to hire. An agent of a mining company may employ laborers in the business of the company, but he can not pledge the faith of the company to persons not so employed.

Hostler for agent. The hire of an hostler in charge of a team used by the agent in the business of the defendant company, and also while attending to business for other companies, is not a contract within the power of the agent to bind the company.

Ratification. But the admissions of the corporate officers, when informed of the claim, were held to amount to a ratification.

Admissions by defendant's agents. To admissions by a director, and by the succeeding agent of the company, a general objection was made below. Such objection can not be made specific above. If their want of authority to bind the company had been suggested below, it might have been proved.

Remittitur—Costs. Damages in excess of the evidence may be remitted in the appellate court, the appellant being allowed his costs.

Appeal from District Court of Gilpin County.

At the trial, M. B. Hays testified: "That he, as agent of defendant, employed the plaintiff in the spring, 1867, at \$60 per month, and that plaintiff worked for defendant about a year; that the work of plaintiff was to take care of the team of James E. Lyon & Co., and to saw wood for the house and office, and there was due defendant, on the 15th of January, 1868, the sum of \$490; that he, the witness, was the agent for defendant, and for James E. Lyon & Co., and that the

team was used by him in the business of defendant, and also while attending to the business of other companies."

Mrs. N. Buckman testified: That she had a conversation with Richman, agent of defendant, in 1868, in which she said to Richman, "I hope my brother will not lose anything by the Consolidated Gregory Company;" and he said, "He shall not." Witness was then asked about a conversation with Frank Parmelee. The defendant admitted that Parmelee was, at the time of the conversation, a director of the company. Witness then stated that she had a conversation with Parmelee in 1868, about the claim of plaintiff against defendant, and Parmelee said that plaintiff was a good boy, and should lose nothing by defendant.

The defendant objected generally to the evidence of Mrs. Buckman, but did not state the ground of objection. The verdict was for \$628.83, and the damages were laid in the declaration at \$490. Appellee filed in this court a remittitur, by which he proposed to remit to the appellant the amount by which the verdict exceeds the *ad damnum* in the declaration.

Messrs. JOHNSON & TELLER, for appellant.

Mr. L. C. ROCKWELL, for appellee.

HALLETT, C. J.

The business of the Gregory Company is mining, milling and melting ores. Raber was employed by the agent of the company to take care of a team, the property of Lyon & Co., which the agent says was used for the company. Lyon & Co. made no charge for the use of the team, and before Raber was employed, the company had paid for its keep. I can not perceive that these facts create any obligation on the part of the company to pay for Raber's services. If Lyon & Co. furnished the team without charge, this is no evidence to show a contract with the groom. It is true that the agent of the company states that he employed Raber for the company, but this was evidently beyond his authority. He could employ laborers in the business of the company, but he could not

pledge the faith of the company to persons not so employed.

But the declarations of Richman, who was the successor of Hays in the agency, and of Parmelee, who was a director of the company, must be regarded as an admission by the company of the indebtedness to Raber, and, therefore, a ratification of Hays' act in employing him. The account was entered in the books of the company, and Richman objected to it when he took charge of the company's affairs. It is not shown that any other demand in favor of Raber stood upon the company's books, and it is fair to presume that both Richman and Parmelee referred to this demand in their answers to Mrs. Buckman's inquiries. Therefore, it can not be said that the verdict is not supported by the evidence, and, although the right of the plaintiff below is not very clear, we do not see that the court erred in refusing a new trial. A general objection in the court below to the declarations of Richman and Parmelee, can not be made the basis of specific objection in this court. If Richman and Parmelee had no authority to bind the company, the attention of the court below should have been drawn to the fact, for possibly the plaintiff would have furnished evidence of their authority if it had been questioned. The amount recovered exceeds the amount shown to be due, but appellee has remitted the excess, a practice sanctioned by high authority: *Bank of Kentucky v. Ashley*, 2 Pet. 327.

The remittitur will be received, reducing the judgment to \$490, for which execution may issue from this court, and the appellant will be allowed costs in this court.

Affirmed.

CARPENTER V. BIGGS ET AL.

(46 California, 92. Supreme Court, 1873.)

Mining Company's note—Assignment. The notes of a mining company made by its agent, without authority, are void as against the company, and their assignment will not operate as an assignment of the indebtedness for which they are given.

Appeal from the District Court of the City and County of San Francisco, Fourth Judicial District.

In the spring of 1870, A. R. Biggs was appointed by the "Jennie A. Consolidated Mining Company" as superintendent of its mine near Hamilton, Nevada. The company was incorporated under the laws of California. The superintendent was instructed by letters from the officers of the company and otherwise, not to contract any debt, but merely to expend the money furnished to him, but these instructions were not known to plaintiff or his assignors.

The powers of the superintendent were not defined in other respects. Biggs worked the mine until December 14th, 1870, and his workmen boarded with Morton & Wells until the workmen owed the sum of \$1,133.09 for their board. The company owed the men for work, and Biggs arranged with all the parties that the company should pay Morton & Wells, and the amount should be charged to the workmen, and thereupon gave the following notes:

"HAMILTON, December 13th, 1870.

"Twenty days after date, the Jennie A. Consolidated Mining Company promise to pay to the order of Messrs. Morton & Wells, in United States gold coin, five hundred and sixty-six dollars and fifty-four cents, for value received.

"\$566.54.

A. R. Biggs,

"Superintendent."

"HAMILTON, December 13th, 1870.

"Thirty days after date, the Jennie A. Consolidated Mining Company promised to pay to the order of Messrs. Morton & Wells, in United States gold coin, five hundred and sixty-six dollars and fifty-five cents for value received.

"\$566.55.

A. R. Biggs,

"Superintendent."

Morton & Wells transferred the notes to the plaintiff, by the following indorsement on the back of each:

"Pay to John Carpenter, for value received.

"MORTON & WELLS."

This action was brought against the stockholders of the corporation on said notes.

The defendants had judgment in the court below, and the plaintiff appealed.

G. W. TYLER, for appellant.

A. M. CRANE, for respondents.

By the COURT.

The notes made by the superintendent were not the notes of the mining company. He was not authorized to make notes or contract debts in the name of the company; on the contrary, he was instructed by letters or otherwise, from the officers of the company, not to contract any debt, but only to expend such money as he might be furnished with. The notes not being authorized, were void as against the company, and their assignment did not operate as an assignment of the indebtedness for which they were given.

Judgment affirmed.

SCHAEFER V. BIDWELL.

(9 Nevada, 209. Supreme Court, 1874.)

Mining company's due bills. The superintendent of a mining company being sued upon due bills, signed "J. A. Bidwell, Supt. C. S. M. Co.," may prove that the consideration for the bills passed to the company; that the credit was given to it; that he had authority to bind it, and that he acted solely as such superintendent, to the knowledge of the payees and their assignee.

Appeal from the District Court of Lincoln County, Seventh Judicial District.

Schaefer sued to recover \$2,840.10 on several due bills made to himself and his assignors, and signed "J. A. Bidwell Supt. C. S. M. Co." The bills were given in 1867, but the complaint alleged that Bidwell departed from the State soon after giving them, and did not return until May, 1872.

The answer denied any liability on the bills, but averred that defendant had signed the bills as agent of and on behalf of the Crescent Silver Mining Company, of which he was at the time superintendent and finance agent, and not otherwise.

On the trial the court struck out all testimony tending to show that defendant was acting merely as agent of the Crescent Silver Mining Company in signing the bills, and rejected an offer to prove that the consideration for the bills passed to that company, and that the credit was given to it.

The court instructed the jury that the bills were the bills of defendant, and they were not to take into consideration any evidence to show that any one else, or any company, was responsible for the payment of them; that it made no difference what the letters following the name of J. A. Bidwell on the bills meant; that the court had given the legal construction to the bills, and was alone responsible for doing so, and the jury was bound to apply the law as given by the court.

The jury, under the instructions, found a verdict in favor of plaintiff on the small bills, for \$442.10; and on the bill for \$2,110, claimed to be due plaintiff himself, "in favor of defendant, believing that it never existed." Judgment was entered upon the verdict for the sum so found due, and interest amounting in all to \$740, and costs and disbursements amounting to \$3,683.50. The sheriff's fees were set down in the cost bill at \$2,954.50; but they were afterward on motion reduced to \$94.50, making the costs in the aggregate \$823.50.

Defendant appealed.

PITZER & CORSON, BISHOP & SABIN and A. B. HUNT, for appellant.

J. C. FOSTER and G. S. SAWYER, for respondent.

By the Court, WHITMAN, C. J.

Respondent claimed and had recovery on certain bills, of which the following is a sample in form:

"\$50.00. One day after date, due Henry Devann fifty dollars, value received.

' J. A. BIDWELL,

"Supt. C. S. M. Co.

"CRESCENT MILL, June 18th, 1867."

The appellant, under proper averments in his answer,

sought to prove that the consideration for the bills passed to a corporation, of which he was the superintendent; that the credit was given to it; and that he had authority to bind it by the bills, and acted solely as such superintendent to the knowledge of the world, and especially to that of the payees of the bills and respondent, their assignee. The proffered evidence was rejected, and the jury instructed that the bills were the individual paper of appellant. There was enough on the face of the bills to entitle appellant to make the desired proof: *Gillig, Mott & Co. v. Lake Bigler Road Co.*, 2 Nev. 214. To refuse its admission was error. The jury were deprived of proper evidence, and wrongly instructed.

The judgment is reversed, and case remanded for a new trial.

LONKEY AND SMITH v. SUCCOR MILL AND MINING
COMPANY.

(10 Nevada, 17. Supreme Court, 1874.)

Changing terms of written contract. A parol contract made by the authorized agent of a corporation, is an express promise of the corporation; but the promise of the agent, made without authority, changing, in effect, the terms of a written contract of the company, is void.

Appeal from the District Court of Storey County, First Judicial District.

Plaintiff obtained a judgment in the court below from which the defendant corporation appealed.

MESICK & WOOD, for appellant.

WILL CAMPBELL, for respondents.

By the Court, HAWLEY, J.

Appellant, in April, 1872, "by its president and secretary

duly authorized thereto, and its corporate seal * * * affixed," executed a written contract with one Daniel Grant to sink a new shaft upon its mine. It was therein stipulated that Grant should "*at his own cost* furnish the necessary timbers to timber the shaft and dividings."

This action was brought by respondents to recover the value of lumber sold and delivered by them to said Grant, and used in sinking said shaft. Their right of recovery rests upon a verbal promise claimed to have been made in July, 1872, by S. B. Segur, the superintendent of appellant, to the effect that they should charge the amount then due from Grant, to wit, two hundred and sixty-eight dollars and thirty-nine cents; and, "also, all other bills of lumber which Mr. Grant might order for the new shaft, and that the defendant (appellant) would pay not only the old account but all other amounts" which respondents might furnish Grant to be used in the company's new shaft.

Respondents at the time of this promise were aware that a written contract, for the sinking of said shaft, existed between appellant and Grant. Appellant had no knowledge that such a promise had been made; and no authority was ever given by it to said superintendent to make any such promise.

The district court properly refused to allow the two hundred and sixty-eight dollars and thirty-nine cents, but gave judgment against appellant for the balance.

Did the superintendent have the power, by virtue of his position, to change the terms of the written contract made by appellant?

If there was any testimony showing, as argued in respondents' brief, that Grant had surrendered his contract, and that appellant, with full knowledge of that fact, had directed the superintendent to proceed on its account to sink the new shaft, then for all subsequent supplies appellant would unquestionably be liable, for it is well settled that, whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie: Story on Agency, Sec. 53. But

no such testimony is to be found in the statement which purports to contain all the evidence given at the trial.

Respondents had sufficient knowledge of the existence of the written contract to put them upon inquiry in regard to its provisions; and applying the facts of this case to the principles of law enunciated in *The Yellow Jacket S. M. Co. v. Stevenson*, 5 Nev. 224, and *Hillyer v. The Overman Silver Mining Company*, 6 Nev. 51, it seems to us quite clear that the promise of the superintendent having been made without authority, was void.

The judgment of the district court is reversed, and cause remanded for a new trial.

WILD v. THE NEW YORK AND AUSTIN SILVER MINING COMPANY.

(59 New York, 644. Court of Appeals, 1874.)

Evidence of authority. The acts and declarations of the officers of a mining company, are admissible to show authority of the agent to make expenditures in litigation and in compromising claims; and no resolution or formal corporate action allowing such expenditures, need be shown.

Judgment in coin. Upon a coin contract, the judgment should be for the amount stated in coin, payable in coin, with costs payable in currency.

¹ Wild brought suit to recover a balance of salary alleged to be due to him as superintendent of defendant's mines in Nevada, and for moneys paid out by him in and about the business of the company, mostly for costs and expenses in various litigation with other claimants, and payments made in buying up and compromising outside claims. The balance upon salary was not questioned.

Plaintiff, to prove authority for the various items of expenditure, was allowed to prove under objection, various acts, statements and declarations, written and verbal, of the president, secretary and treasurer of the company, who were in charge of, and conducting its affairs, subject to the general

¹ Memorandum of cause not reported in full.

supervision of its directors; *held*, proper; as it appeared they were done and made in the discharge of their duties. by the managing officers, in the course of the company's business, and relating directly to current transactions therein; that it was not necessary to show authority by express resolution of the board of directors, or by power of attorney, or other formal corporate action.

The referee found the amount to which plaintiff was entitled in coin, then added thereto the premium upon gold, directing a judgment in currency for the amount; *held*, error; that the judgment should have been for the amount stated in coin, payable in coin.

W. H. PECKHAM, for the appellant.

A. G. HALL, for the respondent.

ALLEN, J.

Reads for modification of judgment by deducting the amount added as a premium upon coin, and making the judgment for the amount adjudged to be due, payable in coin, with costs payable in currency, and as modified, affirmed.

All concur, except JOHNSON, J., not voting.

Judgment accordingly.

¹HILL V. SPENCER.

(61 New York, 274. Commission of Appeals, 1874.)

Personal liability of stockholder—Agent not a servant. The agent of a mining company whether acting as its commercial and financial agent, or with extended powers as the manager of its affairs in Mexico and California, the same as the company could do if located there—is not a servant of the corporation within the meaning of the general Manufacturing Act, § 18, Chap. 40, Laws of 1848 of New York, making the stockholders of corporations organized under it, liable for services performed by laborers and servants, etc., for the corporation, and he can not recover from a stockholder for services rendered to the corporation while thus employed.

¹ *Hill v. Spencer*, 2 J. & S., reversed.

Action by Hill against Spencer as a stockholder in "The American and Mexican Silver Mining Company," a corporation organized under the general Manufacturing Act, Chap. 40, Laws of New York, 1848, to recover a balance due to him from the company for services rendered to it, for which he had obtained judgment against the company and the execution issued thereon had been returned wholly unsatisfied.

Hill obtained a verdict, and Spencer moved for a new trial, which, being denied, judgment was entered on the verdict at the general term of the Superior Court of the City of New York, and defendant appealed.

The grounds upon which the plaintiff based his claim were:

1. That the services for which the judgment was recovered were rendered by him as a "servant" of the company within the meaning of the 18th section of that act.
2. That the capital stock of the company had never been fully paid in, as required by law.

After proof had been given on behalf of the plaintiff for the purpose of establishing both of those grounds, substantially as set forth in the opinion, and he had rested, counsel for the defendant moved to dismiss the cause on the ground that no case was made out against defendant. The court held "that the evidence had not established that the capital stock of said corporation had not been fully paid in, but that the plaintiff was a '*servant*' within the meaning of the act, and, on the latter ground, denied the motion." Defendant excepted to the latter ruling.

When the testimony was closed the court directed a verdict for the plaintiff, to which defendant excepted. Verdict for plaintiff and exceptions ordered to be heard at first instance at General Term.

WALDON HUTCHINS, for the appellant.

DUNCAN SMITH, for the respondent.

Lott, Ch. C.

The defendant was a stockholder in the corporation known as "The American and Mexican Silver Mining Company,"

organized under the act of the legislature of this State, passed February 17, 1848 (Chap. 40), entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," and the acts amendatory thereof, when the services for which the judgment recovered against him in this action was rendered. The eighteenth section of that act provides that the stockholders of any company formed under its provisions "shall be jointly, severally and individually liable for all debts that may be due and owing to all the laborers, servants, and apprentices, for services performed for such corporation;" and the recovery against the defendant was had on the sole ground that the plaintiff was "a servant" of the company within the meaning of that section. The only question which it is necessary to examine is, whether he was such a servant. This examination will involve a reference to the material evidence bearing on the subject. It thereby appears that the plaintiff's first employment was under an agreement with the company, in writing, dated May 30, 1863, entered into at their office, in the city of New York, appointing him "commercial agent for the management of their commercial and financial affairs in California and Mexico," and declaring that his acts, "in the performance of his legitimate duties as commercial and financial agent" would be recognized and binding on the company. Under that appointment he went to California, and thence to Mexico, and while in one of those places he received another appointment, also in writing, through the mail, bearing date the 11th day of January, 1864, by which the company ordained, constituted and appointed him "their true and lawful attorney for them, and in their name to take possession of their mines and mining property, together with all and every thing and property belonging to them in Mexico, and to manage and conduct their business and affairs in that country, the same, in all respects, as the said company could do if located at the place;" and they did thereby "ratify and confirm" what he should "lawfully do in the premises." He testified that the last appointment was received by him about sixty days after its date; that under it he "took charge of the mines and property of the company in Mexico, and of its affairs in Mexico;" that in the summer

of 1864, while he was in Mexico, he made a verbal agreement with Mr. William Hickok, the treasurer of the company, who was then at the mines, that he should remain there, and receive \$5,000 a year for his services; and that he subsequently, after the return of Mr. Hickok to New York, received a resolution of the board of directors, through the mail, ratifying that agreement. That resolution bears date August 31, 1864, and is in the following terms, viz.: "Office of the American and Mexican Silver Mining Company, New York, August 31, 1864. At a meeting of the board of directors of the American and Mexican Silver Mining Company, held this day, Mr. Hickok reported that he had arranged with Harry C. Hill to continue in the company's employ, at the mines in Mexico, for one year from June 1, 1864, at a salary of \$5,000; and on motion it was voted to ratify and approve said agreement, and Mr. Hickok was authorized to notify Mr. Hill of the same." The services rendered by the plaintiff were performed under said agreement and appointment. He said that he performed all the duties under them that were required of him; that he "exercised a general supervision of the property there, and of all the affairs, employment and management of the men, purchase of supplies, and all the duties of a general superintendent;" that, "for a time he kept the accounts of the company," until Mr. Hickok came there; that he and a Mr. Welland "attended to the payment of the hands employed at the mines;" that, "there were from a dozen to seventy-five men employed at different times, in mining, making roads, getting out timber, building houses, etc.;" that he "was obliged to travel for the company, to receive, forward and purchase machinery, supplies, etc., and also to perfect the title of the company to the mines;" that the mining settlement owned by the company was called Setentrion, and was situated in the canton of Matamoras, in the State of Chihuahua, in Mexico; there were three mines; that he resided a mile from one mine, three miles from another, and about four miles from another. He further testified that there was no change in his duties from the time he received the authority or appointment of 11th January, 1864, until he left the mines, on 23d of May, 1866, for New York, where he arrived in June, 1866; that he left the mines in consequence

of the failure of the company to remit funds to him; that no objection was made to his course in that respect, and that the president, treasurer and secretary of the company, in an interview with him, at the office of the president, after his return, and some of the directors who were present, promised to pay him his salary. There were also some letters from the president and the treasurer of the company to the plaintiff, introduced in evidence, relating principally to the raising of funds in New York for its use, to be remitted to him. Some of these were written subsequent to the first day of June, 1865, being the expiration of the term of the plaintiff's employment, specified in the resolution of August 31, 1864, above set forth.

The evidence above detailed or referred to was given on the direct examination of the plaintiff. On being cross-examined he further said that there was not any other written express authority for him to act for the company than the said agreement of 30th May, 1863, the appointment of January 11, 1864, and the resolution of August 31, 1864, herein above particularly referred to. No other evidence bearing on the employment of the plaintiff, or the nature and character of his services, was given.

The services for which the recovery was had, had been rendered from the 1st of June, 1865, to the said 23d day of May, 1866; and, from what is shown by the evidence, they were not, in our opinion, performed for the company by the plaintiff as its "*servant*" within the meaning of the section under which his claim was made and sustained. That term is one in general use. In common parlance, it is understood to relate and apply only to a person rendering service of a subordinate, but not necessarily of a menial character to an employer, varying in its nature, according to the business or occupation in which it is rendered, and not to extend to and include every employe or party who does work for another. The context in which it is used, in the section referred to, being associated with "laborers" and "apprentices," indicates that it was intended to apply to a person employed to devote his time, and render his service in the performance of work, similar in its general character to that done by those employes. The provisions of the section are not restricted

to mining corporations only, but are applicable also to corporations formed for manufacturing, mechanical and chemical purposes; and it may be assumed that the nature and kind of services rendered to them differ; some being such as are performed by laborers engaged in a toilsome occupation, or doing hard work, as manual, bodily and physical labor in mines, and requiring little skill; while a different kind of service is rendered by a person pursuing or employed in manufacturing or mechanical pursuits, requiring intelligence and greater skill, some of whom may properly be called servants; and the term "apprentice" is ordinarily meant to designate a person bound to work for a party engaged in such, or similar pursuits, with a view of learning and becoming acquainted with the business thereof. It is, therefore, properly said by the respondent's counsel, in his points, that the word "servants" in this section must be taken to have been used, not in its broadest, most comprehensive, nor in its most limited and restricted sense, but according to the general and ordinary use of the term. And it may be conceded, as he says, that to use it in its most comprehensive sense, would include the president and other officers of a corporation; while its use in a limited and restricted sense would only indicate a domestic, a person employed in the house or family, or a menial who labors in some low employment; and that the term was not intended to extend to the former, nor to be limited or restricted to the latter class; and it may also be conceded, as stated by him, that, "unless it be when domestic or menial servants are referred to, there is no sense or use in which the word servant, by its own force, indicates a mere bodily or manual service;" but that circumstance fails to show or establish that the plaintiff's services were those of a servant, "according to the general and ordinary use of the term," in which sense the counsel conceded it "must be taken to have been used."

The plaintiff's first and original employment, as the case shows, was designated by the company "to be that of commercial agent for the management of their commercial and financial affairs in California and Mexico." That can not well or properly be claimed to be a trust to be executed, or a service to be performed by a servant, in the general and or-

dinary and usual acceptation of that term. The subsequent authority conferred on him by the power of attorney of the 11th of January, 1864, did not interfere with or limit his powers, or affect his duties as such "commercial agent," but extended his powers, so as to take possession of the mines and mining property, together with all other property and everything belonging to the company; and also "to manage and conduct their business and affairs in that country, the same in all respects, as the said company could do if located at the place." By this appointment he was not, by name or special designation, made or constituted the president, or secretary, or treasurer, or any other officer of the company; but he was substantially vested with the powers of all of them combined, and he became the representative of the corporation in every respect, as to its business and affairs in Mexico. The third and last agreement between the company and plaintiff related to the continuance of his services at the mines, at the fixed compensation of \$5,000 therefor, for a year from June 1st, 1864. The compensation is spoken of and referred to in the resolution of August 31, 1864, approving of the arrangement, made by the treasurer with the plaintiff while in Mexico for the payment of such compensation, as "a salary"—a term not ordinarily applied to services performed by a "*servant*" in the general and usual understanding and meaning of the relation of an employe to an employer. The services rendered by the plaintiff were all performed under and in pursuance of the powers conferred on him under the said original agreement, and said power of attorney, but more particularly the latter. He says that he "exercised a general supervision of the property" of the company in Mexico, "and of all their affairs, employment management of the men, purchase of supplies, and all the duties of a general superintendent," and he refers, among other matters, to the keeping of the accounts of the company for a time, the payment of the hands employed at the mines, the purchase of machinery, supplies, etc., and perfecting the title to the mines. Such services do not fall within those done by a servant, as that term is ordinarily understood. The nature and extent of the plaintiff's employments and the services so rendered by him, justify the claim or position of the defendant's counsel as clearly and tersely

expressed in his first point (and which I adopt, as expressive of my conclusions), as follows: "The duties of the plaintiff, under the written authority given him, were those of an agent, to whom the company had deputed its entire powers, in respect to the management of its business in Mexico, so that he could manage and conduct their business and affairs in that country the same, in all respects, as the said company could do, if located at the place. He was to take possession of their entire property, and was to manage their commercial and financial affairs, both in California and Mexico. The mines were in Mexico—not in California—but the range of his employment embraced financial and commercial operations in the latter State. In respect to the mines themselves, and all that pertained to them and the business connected with them, it can not be disputed that he was the sole administrator, endowed with absolute discretion, yea, with all the discretion which the company itself could possess, if it had itself been located at that place. In a word, that until his powers were revoked or modified, he was, for every purpose of management, control and operation of the mines and property in Mexico, the company itself. The officers of the company, in their correspondence with him, treat him on a footing of equality, as one on whose management their success greatly depended, and to whom they intrusted their secret affairs and plans, and troubles and policy;" and, as the counsel further says, "the men employed were employed under him, and there is not a particle of evidence to show that he ever, in a single instance, worked with them, or performed the least manual labor." The question is then very pertinently asked by him: "Is such an agent 'a servant'—a servant within the meaning of the act?" And in my opinion, it admits of none other than a decided and full negative answer without any limitation or qualification, that he is not. It is not necessary, and I will not undertake to state what is necessary, to define who is such servant. The term, as used in the act, is not susceptible of a certain prescribed and infallible definition in each and every case where services are rendered to a corporation formed and organized under it. The nature and character of those services must determine the relation which the person rendering

them bears to such corporation. It is sufficient for the decision of this case to say that the facts and circumstances disclosed clearly show that the plaintiff is not such servant. This conclusion is in harmony with, and sustained by, the reasons given by the judges in the opinion given for the decision of the court of appeals in *Aikin v. Wasson*, 24 N. Y. 482, and in *Coffin v. Reynolds*, 37 Id. 640. In the first of those cases it was held that a contractor for the construction of a part of a railroad is not a laborer or a servant within the provision of the tenth section of the general railroad act of 1850, making stockholders in a railroad corporation formed under it liable for debts due or owing to any of its laborers and servants for services performed for such corporation. In the last, which arose under the same section of the act, by virtue of which the claim under consideration is made, it was held that a secretary of an iron company was not a laborer, servant or apprentice, within the meaning of either of those terms as used in that section. The decision there involved in reality, the principle that the present plaintiff, under his several employments by the company, and standing in the relation which he occupied to it, and which has above been particularly referred to, was not a servant within the meaning of that section, and the reasoning of both the judges, in the opinions published, clearly sustains our conclusion to that effect; but, as before stated, I do not deem it necessary or intend to enunciate any particular definition of the term "servant," as used in the act, which shall be controlling in every case of services rendered to every corporation formed under it. The views above expressed render a particular reference to the different decisions by the Supreme Court and the Superior Court, cited in the points of the counsel of the respective parties unnecessary. They have been carefully examined, and it is sufficient to say, generally, that in some of the cases the facts were essentially different, and that the decisions in the others of them, so far as they are inconsistent with those made by the court of appeals, above cited, must be deemed overruled thereby, and by our conclusion and decision herein. It follows from the considerations above presented, that upon the whole case, the denial of the motion for the dismissal of the complaint, and the

direction of the court given to the jury to find a verdict for the plaintiff, were both erroneous.

The judgment appealed from, must consequently be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

¹THE CUMBERLAND COAL AND IRON CO. AND THE CONSOLIDATED COAL CO. V. PARISH.

(42 Maryland, 598. Court of Appeals 1875.)

Agent can not contract for profit. As between trustee and *cestui que trust*, or agent and principal, the rule is inflexible that the trustee or agent can not take the benefit of a transaction which was in violation of his duty or when the benefit and duty are inconsistent.

The rule includes corporate officers. Directors and managers of corporations are within the rule guarding transactions between trustees and beneficiaries, or principals and agents.

Profit at expense of company. In case of corporate directors there is an inherent rule that they must not use their positions to advance their own interest as distinguished from that of the corporation.

Burden of proof. Where a fiduciary relation existed the burden is upon the trustee to show the transaction with his beneficiary, to have been done in perfect fairness—and this by proof, independent of the instrument under which he claims.

Facts of the case.—Assignee of mortgage distinguished from purchaser without notice. Sherman held a mortgage upon the property of the Cumberland Co. of which he was a director and a few days after its acknowledgment became one of three trustees in a trust deed, securing (among other claims) one of an amount nearly the same as that mentioned in the mortgage, to Sherman himself. The company claimed that the two amounts were the same debt upon which the proof was found to be with the company. The mortgage had been assigned to Parish who sought to foreclose it, but it was *held*, that an assignee does not stand in the position of a purchaser without notice, even if he may have taken the same without knowledge of any defense.

Appeal from Circuit Court of Allegany County.

Bill in equity was filed by Ann Parish, the appellee, in 1871, to foreclose mortgage alleged to have been made by

¹ See note, ante, p. 322.

Cumberland C. & I. Co. to Allen M. Sherman, upon certain real estate in Cumberland, since conveyed to Consolidated Coal Co.

The mortgage was assigned to appellee October 6, 1863, for the consideration, as recited, of \$21,000. The title of the Consolidated Company had accrued before this assignment.

The further facts in the case are stated in the opinion. Appellee had decree below for foreclosure from which decree the defendants appealed.

JOHN P. POE and I. N. STEELE, for appellants.

S. A. COX and WM. WALSH, for appellee.

ALVEY, J., delivered the opinion of the court. It appears that at the time when the mortgage sought to be enforced was made, and for some time previous, Sherman, the mortgagee, was not only one of the directors, but was a member of the executive committee, and also financial agent of the company, the mortgagor. There is, therefore, no question as to the fact that Sherman bore an important fiduciary relation to the company, as well as one of trust and confidence in the general control and management of its affairs. Holding such relation, he was bound to exercise all the power and authority delegated to him in conjunction with others, for the protection of the property, and the promotion of the best interest of the corporators, the stockholders, according to his skill and ability.

As between trustee and *cestui que trust*, or agent and principal, the rule is inflexible, that the trustee or agent can not be allowed to take the benefit of a transaction, the entering into which was in violation of his duty, or where the benefit claimed and the duty required to be performed are in any respect inconsistent, the one with the other. The rule is founded on considerations of public policy, having in view the great difficulty which must always exist in such cases, of obtaining clear and satisfactory evidence of the fairness of the transaction, and of the entire absence of all abuse or advantage taken of the confidence reposed in such trustee or agent. And it is now well settled that directors and managers of corporations and other companies, are equally within the rule which guards and restrains the dealings and transactions between

trustee and *cestui que trust*, and agent and his principal; such directors or managers being in fact trustees and agents of the bodies represented by them: *Attorney-general v. Wilson*, 1 Cr. & Phill. 1; *Benson v. Heathorn*, 1 Y. & Coll. C. C. 326; *York & North Midland R. Co. v. Hudson*, 16 Beav. 485; *Aberdeen R. Co. v. Blaikie*, 1 Macq. 461; *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 587; *Hoffman Steam Coal Co. v. Cumbld Coal & Iron Co.*, 16 Md. 456, and same case in 20 Md. 117.

The affairs of corporations are generally intrusted to the exclusive management and control of the board of directors; and there is an inherent obligation, implied in the acceptance of such trust, not only that they will use their best efforts to promote the interest of the shareholders, but that they will in no manner use their positions to advance their own individual interest as distinguished from that of the corporation, or acquire interests that may conflict with the fair and proper discharge of their duty. The corporation is entitled to the supervision of all the directors, in respect to all the transactions in which it may be concerned; and if one of the directors is allowed to place himself in the position of having his conduct and accounts made the subject of supervision and scrutiny, he, of course, can not act in regard to those matters, both for himself and the corporation; and the consequence is, that the corporation is deprived of the benefit of his judgment and supervision in regard to matters in which such judgment and supervision might be most essential to its interests and protection. Not only this: the remaining directors are placed in the embarrassing and invidious position of having to pass upon, scrutinize and check the transactions and accounts of one of their own body, with whom they are associated on terms of equality in the general management of all the affairs of the corporation. The design of the rule, therefore, is to secure a faithful discharge of duty, and, at the same time, to close the door, as far as possible, against all temptation to do wrong, by subjecting the transactions between parties standing in such confidential relations, to the most exact and rigid scrutiny, whenever such transactions are brought in question before the courts. The transaction may not be *ipso facto* void, but it is not necessary to establish that there has

been actual fraud or imposition practiced by the party holding the confidential or fiduciary relation; the *onus* of proof being upon him to establish the perfect fairness, adequacy, and equity of the transaction; and that, too, by proof entirely independent of the instrument under which he may claim. This is required upon the general principle, "that he who bargains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other. If no such proof is established courts of equity treat the case as one of constructive fraud:" 1 Sto. Eq. Juris. Sec. 311, and also Secs. 321, 322; *Pairo v. Vickery*, 37 Md. 467.

Applying these general principles, and considering the case irrespective of the assignment of the mortgage to the appellee, the proof in the record falls far short of being sufficient to overcome the presumption against the validity of the mortgage and of establishing affirmatively the perfect fairness, adequacy, and equity of the transactions upon which the mortgage professes to be based. On the part of the appellee there were three witnesses examined; the appellee herself, Sherman, the mortgagee, and Loomis, the secretary and treasurer of the Cumberland Coal and Iron Company at the time the mortgage was made. The appellee does not profess to have any knowledge whatever of the original transactions between Sherman and the company, and upon which the mortgage was based, nor of the circumstances under which the mortgage was executed. Her testimony is confined exclusively to the circumstances of the assignment of the mortgage on the 6th of October, 1863. Sherman's testimony, while it relates to the consideration of the mortgage, and the circumstances under which it was executed, is of the most indefinite and inconclusive character. Many of the essentials to maintain the transaction he fails to prove; and of those in regard to which he does speak, he is by no means positive and certain. The mortgage bears date the 23d of September, 1857, and was acknowledged three days thereafter. It was signed by Me-haffey as president, and Loomis as secretary. The affidavit as to the *bona fides* of the consideration was not appended until the 3d of May, 1861, and the mortgage was not filed

for record until the 4th of June, 1861, nearly four years after its execution. The mortgage recites that the mortgagee had therefore, at the instance of the mortgagor, at *several times*, advanced different sums of money, and *on account of which* advances the sum of \$15,000 then remained due to the mortgagee; and it further recites, that it was contemplated that the mortgagee should become bound for the mortgagor, by the loan of his credit, for the use and accommodation of the company to the extent of \$40,000; and that the advances were made, and the then existing liabilities incurred, on the express antecedent promise and agreement, that the company would secure and indemnify the mortgagee by the execution of a mortgage, whenever the latter should require such security. Four days after the acknowledgment of this mortgage, that is to say, on the 30th of September, 1857, the company made to Sherman, the mortgagee, and to Mehaffey and Bloodgood, a deed of trust of all its property, except a particular portion thereof which had been previously conveyed in trust, but including that embraced in the mortgage, to secure the payment of its creditors, among whom was Sherman, to the amount of \$16,585.75. This sum is shown by the books of the company to be the amount due Sherman at the date of the deed of trust, and it is the only sum or credit shown by the books to be then due, and owing to him on *any* account; and it is conceded that if that was the only sum due Sherman at the time, there is no mortgage debt due, for the deed of trust superseded and took the place of the mortgage, as to Sherman's claim; and besides, all the debts intended to be secured by the deed of trust, have been settled and adjusted, including that shown by the books to have been then due Sherman.

But it is contended by Sherman and his assignee, that the debt of \$15,000, mentioned in the mortgage as due on account of advances previously made, was a separate and distinct indebtedness from that shown by the books, and that the advances to the company, making up the aggregate of the mortgage debt, were never entered in the books of the company, and hence the mortgage debt was not included in that secured by the deed of trust. This, to say the least of it, is a little strange. Why take the mortgage for part and not the

entire indebtedness? The amount on the books was in no manner secured, and there could have been no good reason for separating the indebtedness, and securing part and not the whole. The books of the company show that there were regular accounts kept with Sherman, and that he was credited with advances made from time to time. Why the advances constituting the mortgage debt were not entered in the account, certainly requires full explanation. Sherman was a director, a member of the executive committee, and financial agent of the company, and as such not only had access to the books, but it was his duty to inspect them, and to see that they were properly kept, and especially was it his duty to see that all proper entries were made in regard to transactions of his own with the company.

He says, in his testimony, that at the time the mortgage was made the company owed him the \$15,000, for cash advanced, but whether advanced in one sum or not he can not tell; and that he knows of no books, accounts or documents, that would give information upon the subject. He can not tell when the advances were made; he kept no memorandum or account whatever; he does not know how the money was paid the company, whether by check, draft, or cash; he thinks, however, that all the money advanced by him, or nearly all of it, passed through the hands of Mr. Loomis, the secretary and treasurer of the company, though the books disclose nothing in regard to it. In reply to the question, why the mortgage was made for the particular indebtedness, and at whose suggestion, he says he does not remember why it was made for the particular indebtedness; but, according to his best recollection, it was made at the suggestion of the officers of the company, to protect him for the daily loans that he was then making them, and in reply to the further question, whether the sum was made up of different loans, he says, he does not mean so to state; that his best impression, his strongest impression is, that it was one loan. The mortgage, however, recites that the advances, making up the mortgage debt, were made at several times. The witness further states, in reply to the question, whether there was a resolution of the board of directors passed, authorizing the execution of the mortgage, that he *thinks* their counsel did direct a resolution,

which was passed by the board, authorizing the execution of the mortgage, and directing the mode of acknowledgment; but there is no other evidence whatever that such resolution was ever passed. He does not know whether there was any written statement of the account furnished to the board of directors; the secretary of the company kept the entire account; he, the witness kept none. This witness, in the evidence given by him, has failed to explain the circumstances of the loan or loans alleged to have been made by him to the company. He does not show the occasion for the loan, nor how the money was used, nor whether for the exclusive benefit of the company, though no person should be better able to explain these matters than himself. He does not pretend that the stockholders were cognizant of this particular transaction, nor has he even shown that all the directors were fully informed of it and gave their assent to it. No information in regard to it was imparted to any one by the books, and as the mortgage was withheld from record, there were no traces of the transaction, and no means of information, except the private knowledge of the parties immediately participating in it, and no explanation has been given for the great delay in perfecting and having the mortgage recorded, nor for the omission to have the proper entries made in the books of the company from which the transaction could have been understood by those interested in the state and management of its affairs. Why these omissions, if the debt was real, and contracted for a proper purpose, and was in fact different and distinct from that evidenced by the books? If they were for private and secret reasons, as has been suggested, there could have been but one object in view, and that was to conceal the transaction, and to withhold information in regard to it from parties who might be entitled to know and understand the real condition of the affairs of the company; and to withhold information from parties entitled to receive it, would be of itself an act of bad faith, and in violation of duty. But there is still another circumstance to be considered, as reflecting upon the question of the existence or non-existence of the mortgage debt, and though not of a conclusive character in itself, yet, when considered in connection with the other circumstances of this

case, is entitled to weight, and that is the answer of Sherman to the bill filed by the Cumberland Coal and Iron Company against him and others in 1858, and which is the case reported in 16 Md. 456, and 20 Md. 117. By that bill, the accounts between Sherman and the company, as they appeared in the books, and which had been closed by adjustment, were sought to be opened, and surcharged, and falsified, upon the allegation that there was a large amount still due the company from Sherman upon proper and fair settlement. To this bill Sherman filed his answer, under oath, on the 18th of March, 1859—long before the mortgage was placed on record—and in that answer he stated that there had been a full and final settlement of accounts between himself and the company, and he pleaded and relied upon an estoppel to the reopening of the accounts. He stated that it was at his repeated requests that the executive committee of the company entered upon the consideration of the subject, and took the accounts in hand to adjust and settle them, and thereupon made up a statement, showing a balance against him of \$434.90, and proposed the same as an allowance and compromise of all said matters of account between him, the respondent, and the complainants, and a full and final adjustment and settlement of the same. He further stated that, *in order to make a final adjustment and closing up of all matters of account with the company*, he did accept the proposition of the executive committee, and agreed to pay the \$434.90, and the same was accepted and received by the company, in full satisfaction of such account. The mortgage was not set up in the answer as a subsisting claim, or as a separate and distinct debt from that in the books of the company, and which had been adjusted and closed. If, as stated in the answer, all matters of account were finally adjusted and closed, without exception or reservation, it would be but a fair construction to conclude that the advances secured by the mortgage were in fact those shown upon the books, and that they were embraced in the final settlement. And this conclusion is fortified by the fact that it was nearly three years from the time of the settlement, and more than two years from the time of filing the answer, before the mortgage was perfected by the affidavit and placed on file for record, notwithstanding the embarrassed and

involved condition of the company, and that the mortgage remained liable to be totally defeated by creditors. Such delay, under the circumstances, while not *per se* a ground of presumption against the claim, is yet entitled to weight when considered in connection with the other facts of the case. The only other witness examined for the appellee is Loomis, and though examined at great length, he really proves nothing in support of the mortgage. He proves that he was in the employ of the company from the time of its organization until the fall of 1858 or spring of 1859, in the capacity of secretary, and that he kept an account called the "Sherman loan account," which showed the true state of accounts, debit and credit, between Sherman and the company. He further proves that all the money of the company passed through his hands as treasurer, and that he kept all the financial accounts, and that he entered in the books of the company all sums of money received and paid out during the time of his acting as treasurer, which was during the time of the transactions in question. He also states that Sherman's account was fully closed and discharged on the books, and that he could not find on the books any entry of the loans making up the mortgage debt, though he *thinks* that the sum of \$15,000 was *bona fide* due Sherman at the date of the mortgage, consisting of sums loaned the company *at different times*; and that the mortgage debt was separate and distinct from the debt secured by the deed of trust; but when pressed by a close cross-examination, as to the means of his information in regard to this latter fact, he admits that he has none other than the mortgage itself. He says that he has no other means of knowing that such a loan or loans was or were made, than the recitations or statements in the mortgage itself; and that his whole information on the subject is contained in the mortgage. He does not profess to have knowledge as to the transactions upon which the mortgage was founded, and such evidence as has been elicited from him can in no manner aid or support their fairness. From what we have said it follows that, as between the company and Sherman, the case has not been made out in such manner as would justify the court in granting relief at the instance of Sherman, the mortgagee; and the next question is, does the

appellee, as assignee of the mortgage, stand in any better or more favorable position, as against the appellants, than the mortgagee himself, assuming the assignment to have been *bona fide* made? In regard to this question, there would seem to be no difficulty whatever. The assignee of a mortgage does not stand in the position of a purchaser without notice, as against the mortgagor and those claiming under him, notwithstanding the assignment may have been taken without notice of the defenses against the enforcement of the mortgage. The transfer of a mortgage is so far within the rule which applies to other *choses in action*, that where the assignment is made without the concurrence of the mortgagor, as in this case, the assignee takes the mortgage, and the debt secured by it, upon the same terms, and subject to the like equities and defenses, that it was subject to in the hands of the assignor; the mortgagor can not be prejudiced by the assignment, and the recording acts make no difference in this respect: *Matthews v. Wullwoyn*, 4 Ves. 118; *Williams v. Sorrell*, Id. 389; *Chambers v. Goldwin*, 9 Ves. 254; *Clute v. Robison*, 2 Johns. 595. Without considering the several other questions raised by the appellants, it results from what we have said that the decree of the court below must be reversed, and as there is no equity disclosed for any relief, the bill will be dismissed with costs.

Decree reversed and bill dismissed.

¹UNION GOLD MINING COMPANY V. ROCKY MOUNTAIN NATIONAL BANK.

(96 United States, 640. Supreme Court, 1877.)

Excessive loan of national bank not void. A borrower can not avoid the payment of money actually loaned to him by a national bank, because the sum received exceeds one-tenth of the capital stock of the bank.

Competency of juror. A juror in a civil action, who, on his *voir dire*, expresses an entire willingness, as well as ability to accept the facts as they shall be developed by the evidence, and to render a verdict in ac-

¹ Same case below, 1 Colo. 531; 2 Id. 243, 565.

cordance with them, can not be challenged for cause, for the reason that he had previously conversed with another party in relation to the facts of the case, and had received from him an impression in relation to them.

Ratification of unauthorized acts. It was entirely correct to charge the jury, that if Sabin was the agent of the company in working its mines, without authority to borrow money, but did in fact borrow large sums in its name, of the plaintiff, and if on December 16th, 1863, the president was informed of such borrowing and of the amounts, and a demand was made for the payment thereof, and if within a reasonable time the company failed to disavow the acts of its agent in so borrowing the money, the jury would be authorized to consider the company as assenting to what was done in its name.

Error to the Supreme Court of the Territory of Colorado.

WHEELER H. PECKHAM, for the plaintiff in error.

J. M. WOOLWORTH, for the defendant in error.

HUNT, J.

This was an action by the Rocky Mountain National Bank against the Union Gold Mining Company of Colorado, to recover a balance of overdraft, due upon the account kept at the bank, in the name of the company. The balance of overdraft, exceeding \$20,000 was created by drafts or checks drawn by one Sabin, who, claiming to be the authorized agent of the company, acted in its name, and made deposits from time to time to its credit. The jury rendered a verdict in favor of the bank for the amount of the overdraft with interest (\$30,358.32), and from the judgment entered upon that verdict the present writ of error is brought.

The defendant presented formal requests to charge, to the number of forty, one of which was subdivided into three parts. It asked for a new trial upon ten grounds severally set forth; and the assignment of errors below discloses one hundred and thirty-three allegations of error.

There was but a single question in the case, to wit: Were the acts of Sabin the acts of the Gold Mining Company, either by original authority or by ratification? As it was finally put to the jury, was there a ratification of his acts by the company? We shall consider the objections most seriously urged, and having the greater plausibility.

The first objection to the recovery arises from the amount of the debt. The plaintiff is a national bank organized under the act of Congress, of June 3, 1864, with a capital stock of \$50,000: 13 Stat. 99. By the twenty-ninth section of that act, it is provided as follows: "The total liabilities to any association of any person, or of any company, corporation or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in:" Rev. Stat. Sect. 5200.

After obtaining and holding to its own use the money, can the mining company be allowed to interpose the plea, that the bank had no right to loan the money? In *Harris v. Runnels*, 12 How. 79, where the defendant, sued upon a note, set up the illegality of its consideration, it was held that the whole statute then in question must be examined, to discover whether it intended to prevent courts of justice from enforcing contracts in relation to the act prohibited; and that when a statute prohibits an act, or annexes a penalty for its commission, it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it. A statute provided that slaves should not be brought into the State without a previous certificate signed by two freeholders. Slaves were brought in without such certificate and sold, and the purchaser was held liable for the purchase money. Mr. Justice Wayne said that the rule was allowed, not for the benefit of either party to the illegal contract, but altogether upon grounds of public policy.

In *O'Hare v. The Second National Bank of Titusville*, 77 Pa. St. 96, the question was made upon the statute we are considering, and it was objected that the bank could not recover the amount of the loans, in excess of the proportion specified. The court held that the section of the statute referred to was intended as a rule for the government of the bank, and that the loan was not void: See also *Pangborn v. Westlake et al.*, 36 Iowa, 546; *Vining et al. v. Bricker*, 14 Ohio St. 331.

We do not think that public policy requires, or that Congress intended that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of

the money actually received by him. This would be to injure the interests of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank.

We are of the opinion that this objection is not well taken.

It is contended that there was error in admitting Perrin to sit as a juror in the cause. It appears that he had previously conversed with another party in relation to the facts of the case, and had received from him an impression in relation to them. He expressed an entire willingness, as well as an ability, to accept the facts as they should be developed by the evidence, and to render a verdict in accordance with them. He was evidently an intelligent man, and well qualified to act as a juror in such a case. When his name was called, he was sworn to answer truly to such questions as should be put to him touching his competency to sit as a juror in the case. Questions were put to him by the respective counsel, and were answered by him, the result of which was as above stated. At the close of his examination, the record states as follows, viz.: By the court: "Well, I think he is competent. Here the defendant challenged the juror, Perrin, for cause. The court denied the challenge, and the defendant then and there excepted to the ruling of the court." It is not so stated in words, but it is assumed that thereupon Perrin took his seat as a juror, and acted as such during the trial. The facts as stated by the juror do not justify a challenge for cause in a civil action: *Rogers v. Rogers*, 14 Wend. (N. Y.) 131; *Jackson v. The Commonwealth*, 23 Gratt. (Va.) 919; *Freeman v. The People*, 4 Den. (N. Y.) 9; *Lowenberg v. People*, 5 Park. Cr. (N. Y.) 414; *Sanchez v. The People*, 22 N. Y. 147.

The decision of the challenge was submitted to the judge, and we see no just cause of complaint in his decision.

Numerous objections were made to the admission and rejection of evidence, which do not require consideration. We refer only to the objection to the statements or admissions of Becker, the president of the mining company. These were made at various times at Colorado and at New York.

The defendant was a mining company, organized under the laws of the State of New York, but whose mines and whose business (so far as it had any) were in Colorado. Sabin leased a part of their mines, and professed to carry on another por-

tion of them on account of the company, and to borrow the money for its use in that business.

Becker spent much time in Colorado in attending to the company's business there; and, omitting the questionable position of Sabin, he was the only representative in that region.

The effort of the plaintiff on the trial was to show an original authority in Sabin to draw checks in the name of the company, and failing in that, to establish a ratification of his acts by which the company would be chargeable. To this end the knowledge of Becker of what was done by Sabin, and his action in relation thereto, were given in evidence.

The effect of this evidence and of the objections thereto, is much diminished by the charge given by the judge, that the jury might assume that, prior to the 16th of December, 1868, Sabin had no authority to borrow money in its name, but that it was competent for the defendant to ratify the acts and assume the indebtedness created in its name. He further charged them that if Sabin was its agent, and borrowed money in its name which was expended in the defendant's business, and the payment thereof was demanded of the defendant, they were to consider whether the defendant with knowledge of the fact, assented to such demand, and approved the act of Sabin in obtaining the money; that if acts have been done by an agent in excess of his authority, and the principal on being informed of them fails to disavow them in a reasonable time, his silence may be considered as an acquiescence in and an assent to the acts done.

On the 16th of December, 1868, Becker, the president, closed up the accounts of the company with Sabin, and paid him the balance due to him. Sabin's books and the bank books were then present, and Becker knew the amount of the indebtedness which had then been incurred by Sabin to the bank in the name of the company. This settlement was in the presence of the cashier of the bank, and made by his aid. This was clear and distinct notice to Becker of the action of this agent of his company in its name. Becker, as president of the company, was the suitable man to receive the information; and what he said and did about it, and what action in repudiating the doings of Sabin was taken by the company, or whether there was no disavowal, might well be learned from its chief officer.

Potter and Konntze were officers of the bank, and their conversations with Becker were of a similar character.

The court expressly informed the jury that these conversations were allowed for the purpose of showing Becker's knowledge of the indebtedness and the demand upon him for its payment, and not for the purpose of showing a promise on the part of the defendant.

We see no error in this branch of the case.

The judge's charge on the subject of the ratification by the company of the acts of Sabin contained all that it was necessary to say to the jury. It was in substance, that if Sabin was the agent of the company in working its mines in Colorado, in 1867 and 1868, without authority to borrow money in its name, but did in fact borrow large sums of the plaintiff in its name; if on the 16th of December, 1868, the president of the company was informed of such borrowing and of the amounts, and a demand was made for the payment thereof, and if within a reasonable time thereafter, the company failed to disavow the acts of its agent in so borrowing the money, the jury would be authorized to consider the company as assenting to what was done in its name. We consider this charge entirely correct: *Vianna v. Barclay*, 3 Cow. (N. Y.) 281; *Hazard v. Spear*, 4 Keyes (N. Y.), 469; *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300.

Judgment affirmed.

FINERTY ET AL. V. FRITZ.

(5 Colorado, 174; 1 Colorado, L. R. 481. Supreme Court, 1879.)

Can not act for both parties without their consent. If an agent act for both parties in the same transaction, he can not recover compensation from either, unless the parties knew and assented to his acting for both. Nor can an agent become the purchaser without the knowledge and assent of the seller; nor if he be employed to purchase, can he be himself the seller.

When entitled to commission, though sale not made. The general rule is, that the duties of an agent continue, and commissions are not due until he has effected a bargain and sale by a contract which is mutually

binding on the vendor and the vendee. But when the agent produces a purchaser acceptable to the owner, and able and willing to purchase; on terms satisfactory to the owner, the agent has performed his duty; and, if through the fault of the owner the sale is not consummated, the agent may recover his commissions.

Title bond—Only an option till accepted. A title bond executed by the owner of the property only, gives to the obligee an option to purchase; but not being a mutual obligation binding upon both contracting parties, is enforceable only by acceptance and performance of its conditions during the continuance of the option.

Commissions. When an agent to sell negotiates such conditional sale, as between himself and his principal, the execution and delivery of such title bond to the purchaser or obligee may be regarded as a sale of the property during the option; and the agent may negotiate a further sale of the same property for the obligee without forfeiting his commissions.

Agent to sell, himself becoming purchaser, not entitled to commission. But if the agent, concealing from the obligee his agency to sell, induce the latter to undertake in connection with himself the purchase of the property, such concealment, being obnoxious to the rules of public policy, will avoid his commissions, whether the seller knew of the double relation or not.

Appeal from District Court of Arapahoe County.

H. M. & W. TELLER and G. B. REED, for appellants.

WELLS, SMITH & MACON, for appellee.

BECK, J.

The most important questions raised by the assignment of errors in this case involve the subject of agency, and the principles which must control the conduct of an agent in transactions between himself and his employer, and in his transactions with third persons, in respect to the subject-matter of his agency.

The general principles of law applicable to real estate brokers appear to be well settled, and rules defining their duties have been laid down and sanctioned by a long course of judicial decision, but difficult questions often arise, whether or not a given state of facts bring the agent within a rule which imposes a forfeiture of commissions for misconduct. On such questions some contrariety of opinion exists. The weight of authority favors a stringent application of these rules to all cases falling clearly within their reason; but as to

all other cases, whenever it is made to appear that the agent is the procuring cause of the sale, the law leans to that construction which will best secure the payment of his commissions; rather than the contrary.

As applicable to the case under consideration, it may be observed, that it is a well settled rule, that the same person can not be both agent of the owner to sell, and agent of the purchaser to buy, for the reason that the interests of buyer and seller necessarily conflict, and the same agent can not serve both employers with efficiency and fidelity. The interest of the agent conflicts with his duty in such case. His duty to the vendor to sell for the highest price is wholly incompatible with his duty to the purchaser to buy for the lowest price; and these inconsistent relations, if assumed, would expose him to the temptation to sacrifice the interests of one party or the other, in order to secure his double commissions. Wherefore it is the established policy of the law to remove all such temptations, and to this end every contract whereby an agent is placed under a direct inducement to violate the confidence reposed in him by his principal, is declared to be opposed to public policy, and not capable of being enforced as against any person who has a right to object. The effect of the rule is, that if an agent act for both parties in the same transaction, he can not recover compensation from either, unless the parties knew and assented to his acting for both. The rule can not be avoided by proof that no injury has resulted from his double dealing, for the policy of the law is not remedial of actual wrong, but preventive of its possibility.

It is equally well settled that an agent to sell can not himself become the purchaser without the knowledge and assent of the seller; nor, if he be employed to purchase, can he be himself the seller. These rules all rest on grounds of public policy: *Everhart v. Searle*, 71 Pa. St. 256; *Rice v. Wood*, 113 Mass. 133; *Lynch v. Fallon*, 11 R. I. 311; *Raisin v. Clark*, 41 Md. 158; *Lloyd v. Colston & Moore*, 5 Bush, 587; *Kerfoot v. Hyman*, 52 Ill. 514; *Scribner v. Collar*, 40 Mich. 378.

Illustrative of the character of cases not falling within the reason of the foregoing rules, and which constitute exceptions thereto, we note that it is held; if an agent or broker act

openly for owner and purchaser, with the knowledge and assent of both, each having contracted to pay him a commission, he may recover the stipulated compensation from both parties. So, also; if an agent be employed to sell at a stipulated commission, he may offer himself as a purchaser, and if accepted as such under the contract to pay commissions, he may purchase and be entitled to retain from the purchase money an amount equal to his commissions; or, if employed to purchase, the employer stipulating to pay him a given sum for the property, regardless of its cost to the agent, the sum so agreed upon may be recovered.

Again, if the extent of the agency be merely to bring the contracting parties together, and does not involve the duty of negotiating for either, the agent is termed a middleman, and may contract for, and recover commissions from both: *Stewart v. Mather*, 32 Wis. 344; *Shepherd v. Hedden*, 29 N. J. L. 334; *Mullen v. Keetzleb & Lampton*, 7 Bush, 253; *Herman v. Martineau*, 1 Wis. 151; *Siegel v. Gould*, 7 Lans. 178; *Anderson v. Weiser*, 24 Iowa, 430; *Merryman v. David*, 31 Ill. 404.

Appellants insist in this case that the evidence shows Fritz, the plaintiff, to have been guilty of such gross misconduct as forfeits all claims he may have had against them for commissions.

It is shown by the record that on the 28th day of October, 1878, the appellants executed to Davies a bond conditioned to convey unto him the Little Chief mine, at Leadville, provided he paid the sum of \$300,000 purchase money therefor, in thirty days; and containing also, a stipulation for an extension of thirty days, on payment of the sum of \$25,000 as a forfeit in the event that the purchase should not be consummated. On the succeeding day Davies and Fritz entered into an agreement in writing, associating themselves together as partners in the business of buying, selling and trading in mining property, and containing the following stipulation concerning the mine in question: "And it is further expressly agreed, that the said Jacob S. Fritz is to have and receive one-third share of the gross net proceeds, free from all cost and expense, that may be received and realized over and above the respective amounts mentioned in certain bonds, for the

sale of the Little Chief mine and the Union lode, in California Mining District, in said county of Lake; said bonds having been made to the said John Davies by the parties therein named, respectively, on the 28th day of October, A. D. 1878."

Subsequently, it becoming evident that the sum named in the bond as forfeit money, would have to be raised, since a sale of the mine could not be effected within the first thirty days, Davies and Fritz entered into an agreement with Oviatt & Cooper to share with them the profits which might be realized on a sale of the mine, upon condition that the latter parties advance the \$25,000 forfeit money. The money was raised under this arrangement, and paid to the appellants on the 26th day of November. The bond was assigned to Oviatt & Cooper, and appellants executed to them a deed of the mine, bearing date the 26th day of November, 1878, and placed the same in escrow, to be delivered on payment of the balance of the purchase money. On the 23d day of December, 1878, a sale was effected under the Oviatt & Cooper deed, of three-fifths of the mine, for the sum of \$300,000, to John V. Farwell and other Chicago parties. On the same day the entire property was conveyed to Wirt Dexter, in trust for all parties interested; the trust deed securing to Davies, Fritz, Oviatt, Cooper and George R. Clark (the latter being a partner of Oviatt & Cooper), two-fifths of the mine in certain proportions; the trust to be executed after the Chicago parties should be reimbursed the \$300,000 purchase money and expenses, out of the proceeds of the mine.

Davies testified on part of the appellants that an understanding was arrived at between himself and Fritz to procure the bond and share in the profits to be realized upon a sale of the mine, before the bond was executed, and that this understanding or agreement was reduced to writing afterward. Also, that at the time of these transactions, he was not aware of the fact that Fritz was expecting to receive commissions from the appellants. Fritz, on the contrary, testified that he told Davies that he expected to be paid commissions, and he further testified that he had no agreement for an interest in the bond until after the terms and conditions of the contract with Davies were all settled by the execution and delivery of the bond. He also testified to having informed Finerty, subsequent-

ly to the giving of the bond, that he expected to acquire a contingent interest in the property. This statement is denied by Finerty.

We have no hesitation in declaring, as a proposition of law, that if Fritz exerted his influence with appellants to procure the bond in the name of Davies, in pursuance of a secret understanding with Davies, that the bond, when obtained, should be held for their joint benefit, that such conduct was an exercise of bad faith toward the appellants, amounting to a fraud in law. It was an abandonment of his agency, and upon discovering the facts, appellants had the same right to regard him as a purchaser with Davies, as if his name had been inserted in the first instance as an obligee in the bond. It was an attempt to assume the relations of both agent and purchaser, without the knowledge and assent of the sellers, and if the facts are proven, the misconduct constitutes a bar to the recovery of commissions. In the case of *Stewart v. Mather, supra*, Chief Justice Dixon, speaking for the court concerning this double relation of agent and purchaser, very pertinently observes: "The relations are wholly incompatible with each other, and can not be combined in the same person. The law will not permit it. Assuming the character of purchaser, the person so acting necessarily abandons that of agent, and can claim nothing in the latter capacity in his negotiations with his former principal."

If, however, the fact should be found as sworn to by Fritz, that no understanding or agreement was made, whereby he was to be interested in the bond, until after its delivery to Davies, we are of opinion that the foregoing principles are inapplicable to the facts. We will, therefore, consider next how the law should be administered upon this hypothesis. The general rule undoubtedly is, that the duties of the agent continue, and commissions are not due until he has effected a bargain and sale by a contract which is mutually binding on both vendor and vendee: *Love et al. v. Miller*, 53 Ind. 294, 4 C. L. J., 152, and authorities cited.

But where an agent has produced a purchaser who is acceptable to the owner, and able and willing to purchase on terms satisfactory to the owner, he has performed his duty, and if from any failure of the owner to enter into a binding

contract, or to enforce a contract against the purchaser, the sale is not completed, the agent may recover his commissions: *Parsons* on Contracts, 90; *Moses v. Bierling et al.*, 31 N. Y. 462; *Phelan v. Gardner*, 43 Cal. 310.

The sale in this instance was not complete upon the execution of the bond, owing to the peculiar nature of the instrument; and the duties of the agent, therefore, continued for certain purposes. But they did not continue for the purpose of negotiating a sale for the appellants. That branch of his duty was fully performed, and as to it he was discharged. It remained for the agent to do what he could to consummate the sale contracted, and any act of his which would interfere with its consummation, would be a breach of his duty. The reason that the commissions were not due upon the execution of the contract of sale was, that this contract was not mutually obligatory upon both vendor and vendee, and because the purchaser produced was not willing to enter into a contract of this nature. The bond in question was one of those ordinary title bonds so extensively employed in the mining regions of this State, by means of which those desiring to speculate in mines, before purchasing the same outright, procure from the owners an option to buy, on payment of a stipulated price, within a fixed period of time. The obligor binds himself to execute a deed to the obligee, on performance of the condition; no obligation is executed by the obligee. If the contract proves advantageous to the obligee, he pays the purchase money and receives a deed; otherwise he suffers the time for performance to lapse.

So far as the owner of the property and his agent are concerned, the execution of such instrument is to be regarded, during its existence and prior to default, as a sale of the property. Neither can execute any other sale in the name of the former proprietor. But the obligee may contract a sale of the property on his own account, and at any price he can obtain, by virtue of the title which he is to acquire under his bond. He may likewise employ an agent for such purpose, and unless the duties of such agency would conflict with the interests of the obligor in the bond, he may employ for this purpose the same person, who, as agent of the owner, brought the property to his notice, and through whose influence the obligee became

interested therein. What could there be in this new relation of the agent which would be inconsistent with the interests of his former principal and his continuing duty in respect to the completion of the former sale? We have seen that no duty remains as to a further or other sale, and that in respect to such duty he is discharged. The price, terms and conditions of the sale are all settled and have been inserted in the bond; as to these matters no discretion or duty remains. A sale of the property under the bond to other parties is contemplated by the bond itself; hence, the act of assisting the obligee in such sale is not prejudicial to the interests of the obligor; neither does it necessarily conflict with the consummation of the first sale, but is much more likely to be in furtherance thereof, as the effect of a resale is to realize the money which is to mature upon the bond. There is, therefore, nothing inconsistent in the new relation; and if the agent may become the agent of the purchaser in such case, he may, for the same reasons, become jointly interested with the purchaser after the execution and delivery of the bond, without on that account forfeiting his claim for commissions. These views are sustained by the following authorities: Story on Agency, Sec. 31; *Short v. Millard*, 68 Ill. 292; *Hinkley v. Arey*, 27 Me. 364; *Munn et al. v. Bnrges*, 70 Ill. 604; *Wortman v. Skinner*, 1 Beasley (N. J.), 358; *Bochart et al. v. McBride*, 48 Mo. 506; *Pridgen v. Adkins*, 25 Texas, 394.

No specific instructions were given upon either of the foregoing propositions, respecting the relations which Fritz sustained to the appellants, or his conduct toward them; and in view of the testimony, we think the jury was not sufficiently advised upon these points. It is true, no such instructions were prayed by the defendants, but the court rejected instructions which were prayed on the subject of appellee's misconduct, and gave others, instead, upon its own motion. In such case it became the duty of the court not only to instruct correctly, but fully, on the subject. The instructions so given were excepted to, and error assigned thereon, and, as we have seen, they omit to cover material points upon which the recovery may have depended.

Referring now to the relations which Fritz sustained to the purchasers, as bearing upon his right to recover com-

missions, we are of opinion that the doctrine of public policy was carried too far in the instructions given on this point. The appellants were not prejudiced by this error, but in view of the fact that the cause must be returned for another trial, we deem it proper to express our views on the point.

The inquiry whether Fritz forfeited his right to claim commissions by reason of assuming inconsistent relations to the purchasers, should have been limited to the original contract of sale. We have attempted to show that his employers were not legally interested in any other; that it was a matter of indifference to them what future contracts should be made, or by whom they should be made. Their remaining interest was simply the payment of the purchase money named in the bond, and if paid, it was wholly immaterial to them whether it came from the private funds of Davies, from the moneys of Oviatt & Cooper, or whether it was advanced by the Chicago parties. Holding, as we do, that if Fritz procured his interest in the bond in good faith, after its execution, and not in pursuance of a secret understanding or agreement previously made with Davies, that both Davies and Fritz might enter into any contract with other parties respecting the property, which they might be able to effect, not inconsistent with the terms of the bond, it results that such contracts would be separate transactions, wholly independent of the original transaction out of which this controversy has arisen, and between different parties. It would be foreign to the present investigation to inquire what relations appellee sustained to such other parties, growing out of subsequent transfers affecting the property. Such inquiries might become pertinent in a litigation directly involving such transfers, and between the parties thereto.

Whether Fritz occupied the relation of agent to Davies depends upon a question of veracity between them, and upon this point no error is perceived in the instructions. If Fritz, concealing from Davies his agency to sell for the owners, induced Davies to undertake, in connection with himself, the purchase and sale of the mine under an agreement to divide between them the profits arising from the transaction, such facts bring Fritz within the rule of public policy announced by the court, and avoid his commissions, whether the appellants had knowledge of the double relation or not.

We think the court erred in giving to the jury the plaintiff's sixth instruction. Tatem made no unconditional offer to buy the mine at the sum of \$260,000. He did not even examine the mine, and the proof that he would have purchased at this price was insufficient to authorize the jury in finding that he was prevented from buying the mine at this sum by the refusal of the owners to sell. Whether the verdict was affected by this instruction or not we can not know, but it is quite certain that it was improperly given. For the errors mentioned, the judgment must be reversed and the cause remanded.

Judgment reversed.

ELBERT, C. J.

I concur in the conclusion. I think, however, that it is indifferent whether Fritz's contract with Davies was before or after the execution of the bond to Davies. Its bearing on the rights and interests of his principal is the same in either case, and in either case should be taken as an abandonment of his agency.

The rule, as laid down, points out a method, through the interposition of a nominal purchaser, by which an agent may secure not only his commissions as agent, but any advance over and above the price fixed, for which the property may sell, thus accomplishing indirectly what he may not do directly. Its effect is to increase the chances of fraudulent practices, and diminish the security of the relation of principal and agent.

LA CROSSE G. M. Co. v. SCUDDER.

(4 Colorado, 44. Supreme Court, 1877.)

Action for trifling or pretended services. A mining agent, suing his company for services in *keeping off trespassers, etc.*, during the period of his pretended service, had written, that while he was really *not* agent, the belief that he was such, had prevented the claims being re-located; and during this time he had covered up some shafts, and paid "some attention" to the property: *Held*, no cause of action proved.

Error to the Probate Court of Gilpin County.

Assumpsit for work and labor done, etc. The declaration consisted of the common counts, and the plea was the general issue.

L. C. ROCKWELL, for plaintiff in error.

CLINTON REED, for defendant in error.

ELBERT, J.

The trial in this case was to the court; and the evidence clearly did not warrant a finding and judgment in favor of the plaintiff.

He claims compensation for his services as agent in taking care of and protecting from trespassers, certain mining claims belonging to the defendant company, and yet, during and near the period for which he claims to have been acting as agent, he writes to the president of the company, under whose authority he claims to have acted, respecting the mill site of the company and says: "Parties now stand ready to make surveys upon it," (meaning the mill site,) "and the reason they don't, is, they think I am your agent, when the truth is, you have no actual agent in the country."

Again, if from what the president of the company wrote the plaintiff, a promise could be implied to pay him a reasonable compensation for his guardianship of the property, or for any labor done upon it, his evidence respecting the service rendered is too uncertain and contradictory to support a verdict. He says, in his testimony: "I have not charged the company anything for looking after the property described in the lease;" and yet the only mines from which he claims to have driven intruders, and the shafts of which he covered, are the mines indicated in the lease. The only exception is the "Ashtabula Lode;" and the extent of his care and labor concerning this lode, consisted in paying to it, as he testifies, "some attention."

The promise which he claims was made him by the directors of the company at the meeting in New York, was not a promise to pay a salary, but certain *expenses*, which he had incurred, and was thereafter to incur. The expenses proven, if any, amounted to a little over \$100. The judgment was for \$1,100.

In our view, the plaintiff was not entitled to recover, except perhaps for actual expenses incurred, independent of the evidence of the president, Van Ness, who testifies that the defendant never had any business transactions with the plaintiff, except as a lessee of their mines.

The judgment of the court below is reversed with costs, and the cause remanded for further proceedings according to law.

Reversed.

BANK OF DEER LODGE V. HOPE MINING COMPANY.

(3 Montana, 146; 35 A. R. 458. Supreme Court, 1878.)

Authority to draw bill of exchange. A. received the following telegram:

“ST. LOUIS, Feb. 23, 1874.

“To JOSEPH ALGER, Philipsburg:

“Care for company's property, See that McArdle has what he needs. If funds needed, draw on company.

“CHAS. C. WHITTLESEY.”

and thereupon drew upon Whittlesey as Prest. Hope Mining Co. for \$1,000, and signed the draft “Hope Mining Co., By Jos. M. Alger,” which draft B discounted and presented to the Hope Mining Co. for payment, which was refused on the ground that A. had no authority to draw. A. had previously drawn a similar draft for \$500, which B had discounted and the H. M. Co. had accepted and paid, and A. had also checked against the funds of H. M. Co. in Deer Lodge and Helena: *Held*, that the burden was upon B, of proving that A. was the agent of the H. M. Co. in drawing the bill. *Held, also*, that B was not warranted in presuming authority in A. to draw the bill, because he had once before drawn a similar bill, which had been honored, or because he had checked against the funds of the H. M. Co. *Held, also*, that the telegram did not authorize A. to draw in the name of the H. M. Co., but only in his own name for a particular purpose.

Appeal from the District Court of Deer Lodge County, Second Judicial District.

This cause was tried by the court, KNOWLES, J., without a jury, and resulted in a judgment for defendant, from which the plaintiff appealed.

BANK OF DEER LODGE V. HOPE MINING CO. 449

SHARP & NAPTON, for appellant.

W. W. DIXON, for respondent.

BLAKE, J.

The appellant brings this action to recover upon the following bill of exchange:

“\$1,000.00. DEER LODGE, M. T., May 18th, 1874.

At sight, pay to the order of the First National Bank, Deer Lodge, one thousand dollars. Value received, and charge the same to account of

HOPE MINING Co.

To CHAS. C. WHITTLESEY, Prest.

By JOS. M. ALGER.

Hope Mining Co.,

St. Louis, Mo.” [Stamp.]

Indorsement.—“Pay the Security Bank, or order, for collection, account of First National Bank, Deer Lodge, Montana.

W. A. CLARK, *President.*”

The appellant has been incorporated under the laws of the United States and is engaged in a general banking business. It discounted the bill upon its date and paid the proceeds to Alger. The respondent has been incorporated under the laws of the State of Missouri, and is mining some quartz lodes at Philipsburg, and has an office in St. Louis, Missouri. The appellant demanded payment of the bill at the office in St. Louis, May 27, 1874, and the respondent refused to accept or pay the same. Notice of its presentment and non-payment was properly given.

The respondent denied that Alger was its agent and claimed that he had no authority to draw the bill. The court below rendered judgment for the respondent upon these grounds, and also found that it was the custom of the respondent in drawing drafts upon itself, to direct them to Chas. C. Whittlesey, president of the Hope Mining Company. The only authority of Alger to draw the bill is contained in the following telegram, which was transmitted by the Western Union Telegraph Company:

“Dated St. Louis, Feb. 23d, 1874.

Received at———.

To JOSEPH ALGER, Philipsburg:

Care for company's property. See that McArdle has what he needs. If funds needed, draw on company.

CHAS. C. WHITTLESEY.”

This telegram was received by Alger about February 25, 1874, after the death of McArdle. One bill of exchange for \$500 was drawn by Alger, March 26, 1874, which was discounted by the appellant, and afterward accepted and paid by the respondent. The proceeds were expended for the benefit of the respondent. This bill was signed in the same manner as that involved in this action, and all the parties were the same. No other bills were drawn on the respondent by Alger, but during the months of February, March, and April, 1874, Alger checked against some funds of the respondent in Deer Lodge and Helena. Alger was not in the employ of the respondent when the second bill was drawn, and the proceeds were used in defraying the expenses of Mrs. McArdle and her family from Philipsburg to St. Louis. The officers of the appellant did not make any inquiries respecting the authority of Alger to sign these bills, or the purposes for which they were drawn, and never saw the telegram.

We must consider the relations of Alger and the respondent which affect the rights of the appellant. It is evident that the telegram authorized Alger to draw upon the respondent for money for certain objects. Did it constitute Alger the agent of the respondent, and empower him to sign the bill in that capacity? Did the officers of the respondent authorize those of the appellant, with whom Alger dealt, to believe as fair and reasonable men that this authority had been actually given to Alger? An examination of the law of Agency will enable us to determine these questions, and if we find that either of them should be answered in the affirmative, we must decide that the respondent was bound by the acts of Alger: 1 Pars. on Notes and Bills, 100, 101, and cases there cited.

Some of the principles, which are applicable to these questions, have been announced by this court in the case of

Herbert v. King, 1 Mon. 475. It was held that the principal is responsible for the acts of his agent, when they have been done within the scope of his authority, and that "courts will not tolerate any enlargement of this liability." The bill shows that Alger claimed to be the agent of the respondent, and it was the duty of the officers of the appellant to ascertain the extent of his power before they discounted it. In *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 3 N. Y. 631, Mr. Justice Comstock says: "Whoever proposes to deal with a security of any kind, appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry, he deals at his peril:" *Blum v. Robertson*, 24 Cal. 140 and cases there cited. In this action, the burden of proving that Alger was the agent of the respondent in drawing the bill is on the appellant: Add. on Cont., § 57. The power of an agent to make the principal a party to negotiable paper is always restricted by the courts.

"So carefully is this authority watched, that, where power is given to do some things with regard to promissory notes or bills, it can not be enlarged by construction to do other, though somewhat similar things:" 1 Pars. on Notes and Bills, 107.

This doctrine may be illustrated by the following authorities. An agent who is authorized to draw and indorse bills of exchange in the name of his principal, has no power to draw or indorse the bills in his own name, or in the joint name of himself and his principal: *Stainback v. Read*, 11 Gratt. 281. The agent of a corporation who was authorized to borrow money from a bank and execute the note of the corporation therefor, could not bind his principal by borrowing the money and executing a bond for the same under the seal of the corporation: *Little Rock v. State Bank*, 3 Ark. 227; Story on Agency (7th ed.), § 165. An authority to draw is not an authority to indorse or accept bills: 1 Pars. on Notes and Bills, 107, and cases there cited. In *Tate v. Evans*, 7 Mo. 419, the agent was authorized November 28, 1839, to draw a bill of exchange "at four months' date," and the bill was actually drawn December 23, 1839, and ante-dated November 28, 1839, and payable "four months after date." The

court held that the bill was not in conformity to the authority conferred on the drawer and that the principal was not bound.

The authority of Alger to draw checks on the money of the respondent in this Territory is wholly distinct from that of drawing a bill of exchange on the respondent in Missouri. The power to exercise one of these acts does not include the other, and the fact that Alger checked against the funds of the respondent during the time which has been mentioned, does not tend to prove that he had the authority to draw the bill in controversy.

The appellant maintains that the facts which have been referred to, would authorize the officers of the appellant, as fair and reasonable men, in believing that Alger had the right to draw the bill. In other words, the argument is that the respondent is estopped from disputing that Alger had the authority he exercised respecting the bill. The officers of the appellant made no effort to ascertain the power of Alger, and appear to have assumed that the payment of the first bill by the respondent was a sufficient recognition of the authority of Alger, in drawing the second bill. If Alger had repeatedly performed acts like the one in dispute, which had been ratified by the respondent, the officers of the appellant could presume that he was authorized to draw the bill. But this conclusion could not be inferred from one instance of such recognition. The legal effect of the ratification of an unauthorized act, is equivalent to the previous delegation of authority to do the act. This ratification, however, does not operate as presumptive evidence of original authority, but as a confirmation *per se* of the unauthorized act: *Commercial Bank v. Warren*, 15 N. Y. 577. In *Cook v. Baldwin*, 120 Mass. 317, the court held that the part payment by the drawee of a bill of exchange is not such a recognition of his obligation as will, as matter of law, bind him to pay the remainder.

We are now brought to the consideration of the telegram from Whittlesey to Alger, and the rights of the parties to the action, must depend upon its interpretation. What is the character of the instrument which Alger signed? It is a bill drawn by the agent of a corporation upon itself, and may be

treated as an accepted bill or a promissory note, at the election of the holder: 1 Pars. on Notes and Bills, 62, 288, and cases there cited; 2 Greenl. Ev., § 160, and cases there cited. Alger had no authority to make such a bill or note; he was a special agent, and his power was accurately limited. The telegram did not describe or recognize Alger as an agent of the respondent, but authorized him to draw in his own name on the respondent, if money was needed for a particular purpose. It is not necessary for us to pursue this inquiry into the effect of the acts of Alger on the rights of all the parties to the bill. Alger violated his instructions and the respondent is not bound by his action in drawing the bill.

The purchaser of the bill should have exercised prudence and examined the telegram to see whether it justified the act of Alger. "And if, from his omission to call for or to examine the instrument, he should encounter a loss from the defective authority of the agent, it is properly attributable to his own fault, since he must know that he has no other security than his reliance upon the good faith and credit of the agent:" Story on Agency 7th ed., § 72, and cases there cited. The judgment is affirmed.

Judgment affirmed.

THE NEW YORK IRON MINE V. THE FIRST NATIONAL BANK OF NEGAUNEE.

(39 Michigan, 644. Supreme Court, 1878.)

Authority to make notes. A general agent, without being specially empowered so to do, has no authority to make promissory notes in the name of his principal. A Michigan mine belonged to a corporation, whose financial office was in New York. The general agent in Michigan was accustomed to indorse the company's paper for collection or discount, and to draw on the treasurer in New York for the current needs of the corporation, and his drafts were duly paid: *Held*, that this could not imply authority in the agent to make promissory notes in the name of the corporation.

Distinction between corporate and partnership liability. A general

agent in Michigan, and a financial agent in New York, were the only stockholders having beneficial interests in their corporation. In a suit to collect promissory notes, made by the agent in the corporate name, the holder claimed that the corporation had had no meetings for several years; that the agent in Michigan had managed the business exclusively there, and that he and the officer in New York, who acted as president and treasurer, had conducted affairs as if they were partners, and ought therefore to be held, as having fully authorized each other to exercise all powers that partners might exercise. *Held*, that as it did not appear that plaintiff was influenced by the neglect to observe the formalities of the corporation, and as there was no pretense that he had dealt with them as partners, but the notes declared on purported to be corporate notes, the facts stated were immaterial, and plaintiff must make out a case on grounds, which would establish a corporate, not a partnership, liability.

Notes—Caution in buying. Notes made by an agent in the name of his principal to his own order suggest an interest adverse to his principal, and upon their face suggest the necessity for special caution on the part of a purchaser in demanding the authority to make them.

Cross-examination—Trustworthiness of evidence. The object of cross-examination is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained. Evidence which conceals a part of the transaction is defective. Any question which fills up such omission is legitimate.

The question put to witness on cross-examination, whether he had not admitted his fraud in the issue of negotiable paper should have been allowed, as bearing directly on the trustworthiness of his evidence.

Repudiating note. It is competent for a corporation to show in making defense to paper issued in its name, but alleged to be unauthorized, that immediately on its existence becoming known, its validity was formally repudiated.

Error to Marquette.

Assumpsit by *Negaunee Bank v. N. Y. Iron Mine*.
Judgment for plaintiff; defendant brings error.

Three of the notes sued upon were dated, respectively, April 26th, May 1st, and May 6th, and in other respects were alike, and read as follows:

\$5,000.

MARQUETTE, MICH., ———, 1877.

Sixty days after date we promise to pay to the order of Wetmore & Bro., five thousand dollars at Nat. Park Bank, New York, value received.

NEW YORK IRON MINE.

No. ——. Due.

By W. L. WETMORE.

Endorsed, WETMORE & BRO.

Protest fees \$1.26.

N. Y. MINE v. FIRST NA'L BANK OF NEGAUNEE. 455

The fourth read as follows:

\$1,000.

MARQUETTE, MICH., April 30, 1877.

Sixty days after date, the Munising Iron Company promises to pay to the order of New York Iron Mine one thousand dollars, at First National Bank, Negaunee, Mich., with exchange, value received.

E. P. WILLIAMS,

Secretary.

W. L. WETMORE,

President.

No. 332. Due July 2, 1877.

Endorsed NEW YORK IRON MINE.

By W. L. WETMORE.

Protest fees \$1.50.

The facts are stated in the opinion.

W. P. HEALY and G. V. N. LOTHROP, for plaintiff in error.

BALL & OWEN and ASHLEY POND, for defendant in error.

COOLEY, J.

The plaintiff in error is sued as maker of three promissory notes, and indorser of a fourth, all of which are copied in the margin.¹

¹\$5,000.

MARQUETTE, MICH., April 26, 1877.

Sixty days after date, we promise to pay to the order of Wetmore & Bro., five thousand dollars at Nat. Park Bank, New York, value received.

NEW YORK IRON MINE.

No. ——. Due June 25-23.

By W. L. WETMORE.

Endorsed, WETMORE & BRO.

Protest fees \$1.26.

\$1,000.

MARQUETTE, MICH., April 30, 1877.

Sixty days after date the Munising Iron Company promises to pay to the order of New York Iron Mine, one thousand dollars, at First National Bank, Negaunee, Mich., with exchange, value received.

E. P. WILLIAMS,

Secretary.

W. L. WETMORE,

President.

No. 332. Due July 2, 1877.

Endorsed, NEW YORK IRON MINE.

By W. L. WETMORE.

Protest fees \$1.50.

\$5,000.

MARQUETTE, MICH., May 1, 1877.

Sixty days after date, we promise to pay to the order of Wetmore & Bro., five thousand dollars, at Nat. Park Bank, New York, value received.

No. ——. Due July 3.

NEW YORK IRON MINE.

By W. L. WETMORE.

Endorsed, WETMORE & BRO.

Protest fees \$1.26.

By reference to these notes it will be seen that the name of plaintiff in error is subscribed or indorsed by W. L. Wetmore, and the contest has been made over his authority to make use of the name of plaintiff in error, as he has done. The New York Mine is a corporation, having its place of operation at Ishpeming, in this State. It was organized some fourteen years ago, with Samuel J. Tilden and W. L. Wetmore as incorporators. Mr. Tilden has had the principal interest from the first, and has always acted as president and treasurer, keeping his office in New York City. Mr. Wetmore has always, until this controversy arose, acted as general agent, with his office at Ishpeming. The board of directors had been made up of these gentlemen with some nominal holders of stock in New York City, as associates. Meetings of the board appear to have been held very seldom, and the whole business of the company has been done by Mr. Wetmore and Mr. Tilden, the latter looking after the finances, and visiting Ishpeming only twice or three times during the whole period of the corporate existence. Mr. Wetmore hired and paid all the miners and other laborers, and transacted such other business as is usually taken charge of by a general agent, whose principal is at a distance. As such agent he has paid out in all, upwards of \$3,000,000; the payments being generally made in drafts on

\$5,000.

MARQUETTE, MICH., May 6, 1877.

Sixty days after date, we promise to pay to the order of Wetmore & Bro., five thousand dollars, at First Nat. Bank, Chicago, Ill., value received.

No. ——. Due July 5-8.

NEW YORK IRON MINE.

By W. L. WETMORE.

Endorsed, WETMORE & BRO.

Protest fees \$2.59.

This case broadly distinguishes between the nature of authority, to draw bills of exchange, and that to make promissory notes. It also shows that banking upon the credit of the principal establishes no precedent, when it has never come to the principal's knowledge. It also qualifies the case of *Adams Co. v. Senter*, ante, 241, by the same court, showing that powers of this sort are not within the authority of managing superintendents. For other cases showing their limited powers to bind the principal to the payment of commercial paper, see *Bank v. Hope Co.*, ante, 448; *Union Co. v. Bank*, ante, 432 (as to overdraft); *Schaefer v. Bidwell*, ante, 409; *Carpenter v. Biggs*, ante, 407; *Washburn v. Alden*, ante, 320; *Brown v. Byers*, ante, 308; *Moss v. Rossie Co.*, ante, 239; *Hawtayne v. Bourne*, ante 285 (in case of emergency); also cases under **BILLS AND NOTES**.

Mr. Tilden, or in the proceeds of such drafts. For a while the drafts were on time, but latterly the financial condition of the corporation has been easy, and only sight drafts have been drawn.

The firm of Wetmore & Bro. named in the three notes purporting to be made by the New York Mine, was composed of William L. and F. P. Wetmore, and there was evidence that the New York Mine had had business transactions with that firm to the amount, in all, of \$125,000. The Munising Iron Company was a corporation of which W. L. Wetmore, as its note shows, was the president.

It was not claimed on the trial that there had ever been and corporate action expressly empowering Wetmore as general agent to make promissory notes, nor did it appear that he had ever executed any in its name, except a few, as hereinafter stated. Some evidence was put in, which, it was claimed, had a tendency to show the existence of a general custom in the mining region for the general agents of mining companies to make promissory notes in the names of their principals without special authorization, but as there was no showing that authority was not generally given, the attempt was a manifest failure. It was also insisted on the part of the plaintiff that as matter of law, the general agent of a mining corporation by virtue of his appointment as such had authority to bind it by commercial paper, and that the court must take notice of his authority, as they must of the authority of the cashier of a bank, the master of a vessel, or other known agents: *Adams Mining Company v. Senter*, 26 Mich. 73, 76. On the other hand the defense contended that the authority to issue commercial paper was not implied in any general agency, and when conferred must be strictly construed, and in its exercise strictly limited to its exact terms; and that an authority to draw bills would not authorize the making of notes. And it was further contended that even if authority to make notes was implied, the particular notes in suit were presumptively not within the authority; three of them being drawn by Wetmore as agent, payable to the order of a partnership of which he was one of the members, and *prima facie* for the benefit of that partnership, while the other like these was made by Wetmore in one capacity, and indorsed by him

in another, so that apparently he was dealing with himself in making and negotiating all of them.

It was not disputed by the defense that the corporation as such had power to make the notes in suit. The question was whether it had in any manner delegated that power to Wetmore. We can not agree with the plaintiff that the mere appointment of general agent confers any such power. *White v. Westport Cotton Manufacturing Co.*, 1 Pick. 215, is not an authority for that position, nor is any other case to which our attention has been invited. In *McCullough v. Moss* 5 Denio, 567, the subject received careful attention, and it was held that the president and secretary of a mining company, without being authorized by the board of directors so to do, could not bind the corporation by a note made in its name: *Murray v. East India Co.*, 5 B. & Ald. 204; *Benedict v. Lansing*, 5 Denio, 283; and *The Floyd Acceptances*, 7 Wall. 666, are authorities in support of the same view. The plaintiff, then, can not rest its case on the implied authority of the general agent; the issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining, and it is so susceptible of abuse, to the injury and indeed to the utter destruction of a corporation, that it is wisely left by the law to be conferred or not as the prudence of the board of direction may determine.

But it was further insisted on the part of the plaintiff that though Wetmore may never have had the corporate authority to make notes in the corporate name, yet that the course of business was such, with the express or implied assent of Mr. Tilden, as to lead the public to suppose that his authority was ample, and that this course of business should be conclusive in favor of those who had taken the notes in good faith, relying upon it. In support of this position evidence was given that Wetmore was in the practice of taking notes from the creditors of the corporation, and procuring them to be discounted on his indorsement as general agent; and it appeared that the note of \$1,000, counted on in this case was made for a balance remaining unpaid on a much larger note made by the Munising Iron Co., payable to the order of defendant, and discounted by the plaintiff. And on this part of the case we are of opinion that enough appeared to

warrant the jury in finding that this practice of Wetmore to indorse the paper of the company for collection or discount was known to Mr. Tilden, and not objected to by him; that parties taking such paper had a right to believe the indorsement was authorized, and that it was made in the interest of defendant, and not in fraud of its rights.

It was also shown, that within the three or four years preceding the commencement of this suit, Wetmore had made a few notes in the name of the defendant, which he had procured to be discounted. But it was not shown that Mr. Tilden knew of the making of any of these notes until a short time before this suit was brought, and his evidence taken on commission, was offered to show, that when the existence of such notes first came to his knowledge, he took immediate steps to remove Mr. Wetmore from his agency, and to have notice given to the parties concerned, that the notes were issued without any authority whatever, and would not be recognized. This evidence, on objection for the plaintiff, was ruled out.

So far as we can judge from this record, there is no ground for the suggestion that Mr. Tilden had knowledge that such notes were being issued, or any reason to suspect that such was the fact. It seems probable that Wetmore made the notes in his own interest, or in the interest of some other concern with which he was connected, and not in the interest of the New York Mine. Nor do we think there was anything in the course of the business as it had previously been conducted by him, that should have led parties to take such notes without inquiry. It had been customary to transmit to Mr. Tilden the bills receivable and all moneys, and to draw against them in paying demands against the company, and in providing funds to meet its current necessities; but this was a suitable, proper and prudent mode of doing the corporate business, and tended rather to negative than to support the existence of any authority in Wetmore to make notes. Indeed, it is difficult to understand how the putting out of notes could have been either necessary or convenient. Time drafts would accomplish quite as well, any honest purpose that could have existed for making them, without at the same time exposing the corporation to the same risks; for the drafts would necessarily go forward to the financial officer of the corporation for

payment, and would appear when paid, in the corporate accounts, while the notes, if fraudulently issued, might be kept from that officer's knowledge for a long time, perhaps for years, and, if the fraud was successfully carried out, perhaps permanently.

But it is further insisted on the part of the plaintiff, that the defendant corporation is chargeable with negligence in suffering Wetmore to manage the business independently as he did for so long a period, and that this negligence was so gross and so likely to mislead, as to call for the application of the familiar and very just principle, that where one of two innocent parties must suffer from the dishonesty of a third, that one shall bear the loss, who by his negligence has enabled the third to occasion it: *Merchants Bank v. State Bank*, 10 Wall. 604; *Bank of United States v. Davis*, 2 Hill, 465; *Holmes v. Trumper*, 22 Mich. 427-434; *Farmers, etc., Bank v. Butchers, etc., Bank*, 16 N. Y. 133; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *N. Y. & N. H. R. R. Co. v. Schuyler*, 84 N. Y. 30.

While the principle invoked is a very just and proper one, it is one that must be applied with great circumspection and caution. Any person may be said to put another in position to commit a fraud when he confers upon him any authority which is susceptible of abuse to the detriment of others; but if the authority is one with which it is proper for one man to clothe another, negligence can not be imputed to the mere act of giving it. Any one who intrusts to another his signature to a written instrument, furnishes him with the means of perpetrating a fraud by an unauthorized alteration or other improper use of it. But if the instrument was a proper and customary instrument of business, and has been issued without fraudulent intent in a business transaction, there is no more reason for imposing upon the maker the consequences of a fraudulent use of it, than there is for visiting them upon any third person. In other words, it is not the mere fact that one has been the means of enabling another to commit a fraud that shall make him justly chargeable with the other's misconduct; but there must be that in what he has done or abstained from doing, that may fairly be held to charge him with neglect of duty.

If neglect of duty is imputed in this case, it is important to know in what it consists. The argument made for the plaintiff directs our attention to the following facts:

1. Mr. Tilden and Mr. Wetmore were the sole corporators having substantial interest, and without any supervision by Mr. Tilden, Mr. Wetmore has been suffered for many years to manage the business at the mine as he pleased; the public dealing with no other person, either natural or artificial, and having no reason to suppose that any one was reserving from Mr. Wetmore any authority, or questioning his power to act for the corporation, and make use of its name and its credit to the full extent that any one might use them under corporate authority. And the making of promissory notes is an act so similar in all respects to that of drawing bills, and so likely to be conferred where the other is given, that one might fairly infer its existence in this case, in view of the extensive use made by Wetmore, of bills in the corporate business.

2. Mr. Tilden and Mr. Wetmore have conducted the corporate business as if they were partners; Mr. Wetmore exercising unlimited authority at one place, and Mr. Tilden at the other; and the public had a right to suppose that they were trusting each other to the full extent that partners do and must; and therefore that Mr. Wetmore might bind himself and Mr. Tilden, or what is the same thing, might bind the corporation by notes in its name.

3. These views are strengthened by the fact that the corporators did not for years hold corporate meetings or go through the ordinary corporate forms of election, as they should have done, and would be expected to do, if they expected to exist upon the application of strict rules in the corporate dealings with others.

These are the facts which are supposed to have enabled Mr. Wetmore to impose upon the public with an appearance of authority, which had not been conferred upon him. So far as the neglect to hold corporate meetings, or to go through corporate forms is concerned, there is no ground for making it ent any figure in the case. It does not appear that this plaintiff was influenced by any such neglect or knew anything about it; and from anything that appears, their action would

not have been affected by it in any way. It is therefore a fact entirely foreign to this controversy.

Neither do we perceive that the fact that Tilden and Wetmore conducted their business as if they were partners, concerns this plaintiff in any manner. If Wetmore had dealt with the plaintiff in the character of a partner, and had by Mr. Tilden's course been enabled to deceive the bank officers into the belief that they were partners, the case would be different. But the plaintiff has dealt with no partnership; the notes sued upon were given as corporate notes, taken as corporate notes, and are now sued upon as corporate notes. The plaintiff must therefore make out a corporate liability; and as Wetmore gave the notes, assuming to be empowered thereby to pledge the corporate credit, it is of no importance whatever that perhaps he might have pledged his associate as a partner had he attempted to do so, and had the plaintiff taken from him paper that purported to be the paper of partners. For the purposes of this case, it is sufficient to say that is not the case the pleadings make.

Nevertheless, the plaintiff is perfectly right in the argument that the corporation must be held responsible for any appearances which these two corporators held out to the public whereby the plaintiff has been deceived to its prejudice. The plaintiff is therefore entitled to all that can be claimed from Mr. Wetmore's course of business as general agent, so far as it was known to Mr. Tilden. Now Mr. Tilden knew that Mr. Wetmore was managing the business as general agent with little or no supervision by any one; but it would be very dangerous to hold that this should charge him with Mr. Wetmore's frauds. There was nothing in this that might not happen in any case where the business was conducted by an agent at a distance from his principal; say by an agent in New York for his principal in London, or by an agent in San Francisco for a principal in one of the Atlantic cities. Mr. Tilden also knew that Mr. Wetmore was drawing and negotiating bills upon him in the name of the corporation; but this was a proper and customary mode of dealing as between principal and agent, and we see nothing in it calculated to mislead any one into the supposition that Mr. Wetmore was empowered to do for the company anything not customary

for such agents to do, and not included in the authority Mr. Tilden knew Mr. Wetmore to be exercising.

But before the maxim which the plaintiff invokes can be applied to the case, it is necessary to determine not only that fault is imputable to the defendant, but also that the plaintiff is free from negligence. There must be one innocent party and one negligent party before the requirements of the maxim are answered; and the conduct of the plaintiff is therefore as important as that of the defendant. Was the plaintiff in this case free from negligence in discounting the three \$5,000 notes? In law the officers of the bank must be held to have known that Mr. Wetmore had no right to make such paper without express authority; and we look in vain for any evidence that they demanded proof of such authority, or extended their inquiries beyond the agent himself. Moreover there was that on the face of these notes to suggest special caution; they were made by Mr. Wetmore in one capacity to himself and his associate in another capacity, and they indicated or at least suggested an interest on his part in making them which was adverse to the interest of his principal.

The notes also bore the largest interest admissible under our statutes; and this fact, in the case of a corporation whose credit was such that its paper would be readily discounted, and having its office in the city of New York, might well have arrested attention. We do not think that when the bank discounted such paper without inquiry into the authority of Wetmore, it gave such evidence of prudence and circumspection as placed it in position to complain of Mr. Tilden's course of business as negligent. A fair statement of the case for the plaintiff is that both parties have been over-trustful in their dealings with Mr. Wetmore; the defendant not more so than the plaintiff. Unfortunately for the plaintiff, the consequences of the overtrust have fallen upon its shoulders.

The circuit judge in his instructions to the jury assumed that there was evidence in the case from which they might find that Wetmore was held out to the public as possessing the authority he assumed to exercise. We find no such evidence and there must therefore be a new trial. The case of the \$1,000 note is different, as already explained.

Some of the proceedings on the trial require attention, and especially the rule of cross-examination laid down by the circuit judge when Wetmore was on the stand as a witness for the plaintiff. Wetmore was manifestly a willing witness, and made such showing as was in his power in support of the authority which as general agent he had assumed to exercise. But although he was the first witness called, and the case involved nothing but paper made or indorsed by himself, he was not asked respecting his signatures, and the notes were not offered in evidence while he was upon the stand. The reason for this was apparent as soon as the cross-examination commenced, for when the witness was asked any questions concerning the notes, the purpose of which was to show that he had signed or indorsed them without authority and in fraud of defendant, and that he had admitted that such was the fact, objection was at once interposed on behalf of the plaintiff, and the circuit judge, remarking that the witness had given no testimony in reference to the notes, nor had any testimony been introduced by any other party in reference to them, nor had the notes been put in evidence, sustained the objection.

The question of the proper range of cross-examination has been discussed in this State until it would seem that further discussion must be entirely needless: *People v. Horton*, 4 Mich. 67, and *Campau v. Dewey*, 9 Mich. 381, would support the ruling of the circuit judge.

But those cases have been repeatedly overruled. In *Chandler v. Allison*, 10 Mich. 460, 473, Mr. Justice CAMPBELL undertook to lay down the proper rule. The object of cross-examination, he there explained, "is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained, and where the whole truth would present them in a different light. Whenever an entire transaction is in issue, evidence which conceals a part of it is defective, and does not comply with the primary obligation of the oath, which is designed to elicit the whole truth. If the witness were, as he always may be, requested to state what he knows about it, he would not do his duty by designedly stopping short of it. Any question which fills up his omissions, whether designed or accidental, is legitimate and proper

on cross-examination. When the answers are given, the nature and extent of the transaction become known from a comparison of the whole, and each fact material to a comprehension of the rest, is equally important and pertinent. A party can not glean out certain parts, which alone would make out a false account, and save his own witness from the sifting process by which only those omissions can be detected." One might suppose after reading this language, that it was written in anticipation of the proceedings in this very case; and for the specific purpose of expressing in clear and pointed terms the rule of law applicable to these very facts. Here the matter in issue was confined to the single point of Wetmore's authority, to make and indorse the paper sued upon; the questions on behalf of the plaintiff had been carefully restricted to that part of the facts which it was supposed would tend in its favor, and in respect to which a cross-examination could not be damaging, and were intended, instead of eliciting the whole truth, to conceal whatever would favor the defense; the witness, instead of being required, according to the obligation of his oath, to tell the whole truth, had been carefully limited to something less than the whole, and when questions were asked calculated to supply his omissions, they were ruled out because they did not relate to the precise circumstances which the plaintiff had thought for its interest to call out. It would be difficult to present a more striking illustration of the error in the rule in *People v. Horton*, than is afforded by this case; for here was the principal actor in the transaction under investigation, brought forward as a witness to support his own acts, but carefully examined in such a manner as to avoid having him utter a single word regarding the main fact, though it was peculiarly within his own knowledge, and even his handwriting was left to be proved by another. In that manner he was made to conceal not merely a part of the transaction, but the principal part, and made to tell not the whole truth according to the obligation of his oath, but a small fraction of the truth only; a fraction, too, that was important only as it bore upon the main fact which was so carefully kept out of sight while this witness was giving his evidence. It is true the defense was at liberty to call the witness subsequently, but this is no answer; the defense was not

compellable to give credit to the plaintiff's witness as its own, for the purposes of an explanation of facts constituting the plaintiff's case, and a part of which the plaintiff had put before the jury when examining him. One of the mischiefs of the rule in *People v. Horton*, was that it encouraged a practice not favorable to justice, whereby a party was compelled to make an unfriendly witness his own, after the party calling him had managed to present a one-sided and essentially false account of the facts, by artfully aiding the witness to give such glimpses of the truth only, as would favor his own side of the issue.

What has been said on this point has in substance been said many times before: *Haynes v. Ledyard*, 33 Mich. 319; *Hamilton v. People*, 29 Mich. 173; *Campau v. Traub*, 27 Mich. 215; *Wilson v. Wagar*, 26 Mich. 452; *O'Donnell v. Segar*, 25 Mich. 367; *D. & M. R. R. v. Van Steinburg*, 17 Mich. 99; *Thompson v. Richards*, 14 Mich. 172; *Dann v. Cudney*, 13 Mich. 239. The necessity of repeating it is a singular illustration of the difficulty with which a mischievous but plausible precedent is sometimes got rid of.

The question put to Wetmore on cross-examination, whether he had not admitted his fraud in the issue of this and similar paper, should have been allowed, as bearing directly upon the trustworthiness of his evidence. The evidence of Mr. Tilden, that the directors repudiated this paper as soon as it came to their knowledge, was also admissible. The repudiation could not invalidate paper issued with proper authority, but it could and would preclude those forcible inferences that would naturally be drawn in favor of the legitimacy of the paper, in the absence of any showing that protest was made when its existence became known.

Many subordinate questions are rendered immaterial by the views expressed on the main question.

The judgment must be reversed with costs, and a new trial ordered.

The other Justices concurred.

BREED V. FIRST NATIONAL BANK OF CENTRAL CITY.

(4 Colorado, 481. Supreme Court, 1878.)

Authority of mining superintendent to borrow money. A mining superintendent, by virtue of his employment merely, has no authority to borrow money on the credit of his principal. The power of an agent to draw on a principal's funds is entirely different from the more comprehensive power to draw on his *credit*. The former does not include the latter. Neither by note nor overdraft, can a mining superintendent, as such, bind his principal.

Duty of principal to either ratify or repudiate. Where an agent, without original authority, borrows money on behalf of his principal, and uses it in a manner advantageous to the principal, the ratification of the agent's act may be inferred from the silence of the principal after knowledge of the facts. It is the duty of the principal to repudiate the unauthorized act, if he does not acquiesce in it, and, if he fail to do so within a reasonable time, the jury may infer a ratification; but no estoppel is created, if the unauthorized action is complete before knowledge of it reaches the alleged principal, and the status of the parties would not be changed by his failure to approve or disapprove within a reasonable time.

Appeal from the District Court of Gilpin County.

ASSUMPSIT. Declaration on two notes to which the common counts were added. Pleas, general issue and *non est factum* verified. The notes described in the declaration were as follows:

"\$3,000.00. CENTRAL CITY, COL., Feb. 27, 1875.

One month after date we promise to pay to the First National Bank of Central City, or order, the sum of three thousand dollars, for value received, negotiable and payable without defalcation or discount, at their office in Central City, Colorado, with interest at the rate of one and one-half per cent. per month from date until paid.

CARIBOU TUNNEL Co.,

By J. M. DAWLEY, *Supt.*"

"\$317.96. CENTRAL CITY, COL., April 1, 1875.

Fifteen days after date we promise to pay to the First National Bank of Central City, or order, the sum of three hundred

and seventeen dollars and ninety-six cents, for value received, negotiable and payable without defalcation or discount, at their office in Central City, Colorado, with interest at the rate of one and one-half per cent. per month from date until paid.

CARIBOU TUNNEL Co.,

By J. M. DAWLEY, *Supt.*"

There were two trials of this cause, the first resulting in a verdict for the plaintiff in \$4,143.46.

Upon the second trial the bank had a verdict for the sum of \$4,145, and judgment was rendered on the verdict. The defendant appealed.

The testimony of James M. Dawley, taken in the former trial, was read by agreement, as follows:

"I know Abel D. Breed; knew him in August, 1872, and had business transactions with him at that time; I commenced working the Caribou tunnel August 16, 1872, and worked until April 16 or 17, 1875; it was in about 68 feet when I commenced; in August, 1872, I made a contract with Breed to run the tunnel; I run it under that contract until April, 1873; the tunnel was run to the Caribou mine, which Mr. Breed, I believe, owned at the time I commenced; in the latter part of April, 1873, Breed and myself threw up that contract; I was to keep on running the tunnel; he was to sell the tunnel and I was to have an interest in the sale; this was by mutual agreement between Breed and myself; he was very particular for me to keep it to myself and say nothing about it to any one; he told me the contract was in the little safe, and I could get it and destroy it; I was to run the tunnel as I had been doing previously and he was to furnish the money; I was getting a salary from the Mining Company Nederland, and he requested me to use what I could of that in the tunnel, and when he sold the mine he would remunerate me for what money I put in, and for my salary."

Defendant moved to strike out all of witness's testimony about the annulling of this contract. Overruled, and defendant then and there excepted.

"In April, 1874, I had a talk with Mr. Breed about the contract again; I could not find it in the little safe and told him I thought it must have been sent to Cincinnati; he told

me when he went home he would look for it, and if found, he would cancel it or send it back to me; I told him he need not send it back, he could tear it up; I only wanted it destroyed; he said, all right, it should be destroyed and never brought up again; I paid no more attention to the contract, supposing it destroyed.

“After April, 1873, until April, 1875, I employed men and run the tunnel as I had been doing. Breed sent me money, or authorized Allen to draw money every month when my pay-rolls became due; Allen was in the employ of the Mining Company Nederland, and was Breed’s confidential agent. After Allen left I forwarded every month’s pay-roll to Breed on the first of the month, and he sent me a draft for the amount, which he continued to do until the last one, which I think was sent in June, 1873; at that time I had been working several months on some veins struck in the tunnel, and had taken out ore enough to pay expenses; the tunnel was completed to the mine some time in May, I believe. When Mr. Breed was out in the fall of 1874, he requested me to put some men in the tunnel beyond the Caribou mine which I did, also to work on the lodes; the lodes did not pay; Mr. Breed went away, and in December, 1874, I had no money to meet my November pay-roll. I wrote to Breed and sent amount of indebtedness of tunnel, and received no answer; I overdrew my account at the bank several hundred dollars to pay the men, and wrote Breed respecting it; also telegraphed him, but received no reply. He had authorized me to keep the tunnel running; I talked to the men about it and they said they were not at all afraid to work for Breed; I kept the tunnel going until April 17, 1875, when Mr. Breed telegraphed me to stop work; Mr. Breed requested me to work the lodes, and I worked them under his direction; with the proceeds of the ore I paid the debts of the company; I sent Mr. Breed the pay-rolls or a monthly statement of the expenses; my first overdraft at the bank was in December, and amounted to \$2,500; it was increased to \$3,000, and April 27, 1875, when I received the telegram to stop work, \$373 more to balance the account. Mr. Thatcher said the law did not allow him to have overdrafts, so I gave these notes in this form; I was not going to be responsible

for Mr. Breed's debts; the account had been kept in the name of the Caribou tunnel, so I made out these notes in that name and signed my own name by which I became responsible also. I paid the indebtedness of the Caribou tunnel with money received from overdrafts; I notified Mr. Breed of the overdraft but received no reply. During the time I worked the tunnel I received drafts from Mr. Breed, which were cashed at the First National Bank. In the fall of 1874 the account was ahead about \$2,000.00 from the proceeds of working these mines. These lodes were all recorded in Mr. Breed's name; he claimed them; they were the Sherman and Poorman. The lode and tunnel accounts were kept together as one account."

The witness here identified the letters referred to in his testimony.

"About April 24, 1874, I received a draft from Mr. Breed, No. 329, for \$700 on A. L. Scoville & Co., New York. I also received a draft previous to that for \$1,200; the letters contained the drafts as stated, which were deposited with plaintiff, and the proceeds used for working the Caribou tunnel; none of the drafts or money were received by me as contractor; they were paid to me in the capacity of superintendent of the tunnel."

Cross-examination: "The contract I spoke of was in writing, signed by Breed. (Paper marked X handed to witness.) I commenced work on the tunnel under this contract, and continued until the last of April, 1873; I then told Mr. Breed I could not run the tunnel under that contract after the Caribou mine was sold. He said: 'All right, we will cancel the contract, but I am going away and I want you to keep on running the tunnel; I have entered into an arrangement with the Mining Company Nederland to run that tunnel to the Caribou mine, in consideration of the sale; I will furnish you the money necessary to complete the tunnel.' I was in probably 350 to 400 feet; up to this time I had only worked one vein and that did not pay. On that day the contract was annulled, and after that I was running the tunnel as Mr. Breed's superintendent; I kept a bank account both before and after this time, always in my own name; so kept at Mr. Breed's request; I kept the accounts at the tunnel and the pay-rolls

in the name of Caribou tunnel; I signed my own name, J. M. Dawley, to the checks; the tunnel cut this vein that paid in August, 1873; I took out ten or twelve thousand dollars; I put the proceeds in the First National Bank to my credit; my salary after the time the contract was given up was to be made all right when he sold the mine; he was to give me an interest in the sale of the tunnel; he told me not to charge up anything for salary, he would give me an interest in the sale; I took some money for my own expenses and charged it to myself on the books; can not tell how much; I had nothing to do with the Mining Company Nederland so far as running the tunnel was concerned; I did not see the contract at that time and did not know its contents; all I knew was Mr. Breed made some kind of an arrangement for the company, to run out and meet me; I think, at Mr. Breed's request, I helped measure the work they did; I commenced sending Mr. Breed memorandum of indebtedness every month, in the fall of 1873 or spring of 1874; the checks which Mr. Allen drew were drawn on Mr. Breed's account at the First National Bank, and I deposited them in my name, and drew checks to pay the men and necessary expenses; I commenced in this way, and when the contract was annulled he requested me to continue to do so, and I did; after Mr. Allen went away in 1874 I had access to the safe; I worked the lodes up to the time I quit and rendered him a statement of what I took out; I claimed no interest in them; when I was \$2,000 ahead Mr. Breed applied to me for the money; I employed the men in the name of the Caribou tunnel; in December, 1874, I notified Mr. Breed by mail and telegraph of the overdraft, and to send a draft or authorize me to draw; it was he who was overdrawn, but in my name; I was then running the tunnel beyond the Caribou and working on two lodes; there was no arrangement for running the tunnel beyond the Caribou vein, only Mr. Breed went in there and told me to run it on beyond the Caribou, and I ran it about 84 feet; I quit all work when I received the telegram from him; the \$2,500 note was taken up by giving another; I indorsed this note for forty days, and I made the other indorsements; I presume I was liable on the notes; I had no authority to sign Mr. Breed's name.

Question. He never gave you authority to borrow money, did he?

Answer. I do not know what you call it; I think I was authorized; I had to get money from some place; he authorized me to run the tunnel, and never authorized me to stop until he telegraphed.

I notified Mr. Breed I had executed these notes in name of Caribou tunnel, in December, by letter, just as soon as I did it; I think it was June or July, 1874, that Mr. Breed, sent me last draft; for three or four months after that I did not have to draw; made money enough out of the mine; Mr. Breed did not answer the letter; did not hear from him from that time to this, and did not see him until yesterday.

At the time I commenced this account on which suit is brought, at the bank, I explained to them my relation to Mr. Breed; they understood this money was used on Mr. Breed's account as well as I did; Mr. Breed knew I kept the account in my own name, and knew this when the account was \$2,000 ahead; he wanted me to draw him a check for it; he claimed it as his; I told him the tunnel was not working well and it would be best to leave it, as I might have to draw on him for it back next month.

I think I gave the bank a note in July, 1874, for \$400 for an overdraft, which was paid by check on my account; that note was signed individually, J. M. Dawley; that was the only note I ever gave them except these; the one signed Caribou Tunnel "Company"—I should have left the *company* off."

Witness recalled for plaintiff in rebuttal:

"I heard Mr. Breed's testimony in reference to the Nederland contract; I knew such a contract was in existence from the time it was made; Mr. Breed told me he had a contract with the company to meet me; I did not have any interest in the contract that I know of; did not know my name was mentioned in it; Mr. Breed never had any settlement with me about that contract; did not consult me about making it; he did not make a verbal arrangement with me to run the tunnel beyond the Caribou; I never had such a conversation with him about it; there was no

agreement by which I was to run the tunnel beyond the Caribou at so much per foot; I run it as superintendent for him at his expense."

Cross-examination:

"*Question.* You say you never saw the contract with the Nederland Company?

Answer. I never saw it; never knew my name was connected with it.

Question. Never knew about the amount paid?

Answer. I might have known it.

Question. Had nothing to do with paying the amount? Whose handwriting is that? (Paper marked Z handed witness.)

Answer. That is mine.

Question. Read it and see what it is; it is all in your handwriting?

Answer. Yes, sir; this letter is in my handwriting, and this statement, which was inclosed; all done at Mr. Breed's request; I got the entries on this sheet from the book in the safe; I made the entries at the time they are dated, I presume; they were probably handed me on a slip by Mr. Breed; on the 13th day of October, 1874, I wrote to Scoville & Co.: 'Gents.: Inclosed find statement of the journal and cash-book entries made since last statement sent you by Mr. Breed;' that refers to this sheet, and was at Mr. Breed's request; I entered on the journal at the date of it, 'The Caribou Tunnel to J. M. Dawley, for running tunnel, March and April, since last measurement, 16 feet at \$18 per foot, \$228; also, running 2d, 94 feet at \$20; the above completes contract to the Caribou tunnel.' Mr. Breed requested me to keep the tunnel running as I had done; so far as I was concerned, the contract was annulled; I made the entry 'James M. Dawley to Mining Co., Nederland, for running tunnel from Caribou mine to intersection with Dawley, 80 ft. 5 in. at \$28 per foot;' I made it out that way by Mr. Breed's instructions, and sent Scoville & Co. a copy; I was keeping the books, and did it just as he instructed me."

J. A. Thatcher testified: "I am president of the First National Bank of Central City, and have been since it was organized; had business transactions with Dawley in 1873.

and for a long time previous; in the fall of 1874 he was running the Caribou tunnel; his business was active; drawing and receiving remittances from Breed; depositing them and conducting mining business as is usually done by agents; the last draft, I think, came from Breed in June, 1874, for about \$1,400; after that time up to December 22d, Dawley was working the mines crossing the tunnel, and met his current expenses; our first advance to Dawley in December was \$2,500; we authorized him to check for it; I told him we could not allow an overdraft, and he executed a note at my request; we let him have \$500 more, later in that winter; after that some more; the total was \$3,316; it was paid out in small checks to the workmen; no check larger than \$100 unless it was to some merchant; sometime about November 1, 1874, I had a conversation with Breed about our transactions with Dawley; Dawley's account was then good; I took Mr. Breed into the back room; he asked me to show him Dawley's account, and how it was kept, and its condition as to debits and credits, and how he stood at that time; I showed it to him and he expressed his gratification to me, and asked me as to Mr. Dawley's habits, and whether he was conducting his business right in my judgment; I told him we kept the account in Dawley's name, as Dawley said he had requested that it should be kept in that way; I can not say what Mr. Breed's answer was to that; in the early part of that year Dawley told us that the contract between them had been thrown up; said Breed requested him to keep the account in his own name; we transacted a great deal of business with Breed personally; he had his personal account there; he knew we kept that account as we did; I showed him the account and the amount Dawley's account was good for at that time; he seemed gratified and mentioned the amount, about \$1,900; he examined the account and spoke of it as his own; the checks paid were placed to his, Dawley's, debit, and Breed's drafts were placed to his credit."

Cross-examination: "He commenced business with us as Thatcher, Standley & Co., in 1872, simply as J. M. Dawley; I think he overdrew \$300 or \$400 in 1872, which I think was paid by Mr. Breed's check or draft; we made him the loan of \$2,500; that is, we agreed upon that amount he could use; it

was paid out on checks to workmen and merchants, none to Dawley himself; we paid the checks as made and did not inquire who they went to; the first note was made by Mr. Dawley, December 22, 1874, and credited to his account that day; I asked Dawley very particularly for what purpose he wanted the money; the note was for \$2,500, due in forty days, and it was expected and represented by Dawley that Breed would return by that time and make it good; this note was renewed for thirty days, and we let him have \$500 more; at the end of the thirty days we took his note for \$3,000; he said it was Breed's affair all the time, therefore I did not look to anybody but Breed for payment; he did not have authority to sign Breed's name to the note; everything was done in the name of Dawley."

Re-direct examination: "After the debt was contracted I wrote Mr. Breed about it, but got no answer; the first letter was written at my house and I have no copy of it; to the best of my knowledge it was deposited in the mail; we had great trouble in finding Mr. Breed; he was supposed to be in Cincinnati, or a letter would be forwarded to him from there, and we only wrote to him there; I used a return envelope, and the letter never came back; I wrote a telegram for Mr. Dawley, and think I signed it with him; we tried to find Mr. Breed; he was in the interior of California, and could not be reached; the telegram was sent to San Francisco, but he was then in the Pleasant Valley mining region; it was sent within two or three days after Dawley got the money, and stated exactly what he had done; that he got this money from me to pay this pay-roll, stating the amount; we received no reply; after several days the message was repeated; the second letter was written October 12, 1875." Copy read as follows:

"CENTRAL CITY, October 12, 1875."

Mr. A. D. BREED, Cincinnati, Ohio:

Dear Sir—We had expected to see you here long before this, and now learn that you are East. I wrote you to request you to settle up our debt against the Caribou Tunnel Company, created by Mr. Dawley. It is a fair, honorable and just debt, and I trust you will not compel us to wait longer

on this matter. The debt was created in the name of the 'C. T. Co.' by Mr. Dawley, sup't, and whatever the differences between yourself and Mr. D., it should not work an injury to us in delaying the matter. Please reply at once to this.

Yours, very truly,

J. A. THATCHER, *President.*"

"These are the notes. (Notes sued on shown to witness.)

I do not know where Dawley is now; at the time of the loan he was not worth anything, and that was the reason I loaned the money to Breed."

Richard Crow sworn, and testified: "I reside in Nederland; have known Mr. Breed since 1871; I was in his employ from 1871 until he quit working the Caribou tunnel in the spring of 1875; I was hauling quartz and wood; hauled from the Sherman and Poorman; I knew James M. Dawley; he was working the mines and driving the tunnel; he commenced running the tunnel south of the Caribou lode sometime in the fall of 1874; Mr. Breed was out here two or three times, and always spoke to me as if he was interested in running the tunnel; I heard him say regarding the lodes that he had three-fourths of the net proceeds; the Sherman and Poorman lodes were owned in New York, I believe; Mr. Breed worked them right along as if he had a right to.

Mr. Breed claimed 250 feet on each side of the tunnel on the lodes crossed by it; the Sherman is an old discovery, and the Poorman was discovered before the Caribou; Dawley was working on these lodes about 200 feet below the surface, and there was no connection with the surface, but it was afterward proven to be on these lodes; I was paid for my work at the tunnel by check on the First National Bank, signed by James M. Dawley."

Clarence A. Sherwood sworn, and testified: "I reside at Caribou, and am engaged in mining; have been acquainted with Mr. Breed since 1871; I worked for him over three years; at the Nederland mill twenty-two months, and then at the Caribou tunnel and lodes struck in tunnel; I understood I was working in the tunnel for Mr. Breed. Mr. Dawley paid me by check on the First National Bank. Mr. Dawley

employed me to do that work; I commenced in April or May, 1873, and worked both north and south of the Caribou."

J. A. Thatcher, recalled: "This claim with interest at ten per cent. per annum amounts to-day to \$4,145."

Plaintiff rested.

Defendant read in evidence the deposition of Abel D. Breed, as follows:

"My name is Abel D. Breed; sixty-six years of age; a manufacturer by occupation; I know the plaintiff; I am defendant; I have known James M. Dawley since 1872; he has been in my employ; my first business transaction with said Dawley was in form of a contract on the third day of August, 1872, a copy of which is hereto attached (same as offered in evidence and marked X). On or about September 1st, 1872, I employed him as foreman of my mill at Middle Boulder; the said Dawley was never employed by me as my agent; he was employed by me both in the capacity of hired laborer and contractor, but never as an agent. He contracted to drive the Caribou tunnel for me according to the provisions of the contract referred to above (marked X); the original contract is in the hands of my attorneys, H. M. & W. Teller, of Central City, Colorado; I knew the Mining Company Nederland in 1873; I made a contract in writing with said company in 1873, a copy of which is hereto attached (same as offered in evidence and marked Y), the original of which is now in the hands of my attorneys H. M. & W. Teller, Central City, Colorado; I made but one contract with this company; this contract provided for the running of a tunnel from the Caribou mine to meet the tunnel being run by Dawley; Mr. Dawley knew of the making of the contract with the Mining Company Nederland and he assented thereto, and was very anxious to have the contract made, as he believed the tunnel, if driven by said company, would intersect rich veins in the course of its progress by which he would be much benefited financially, as provided for in the contract (marked X).

"Said contract (X) with James M. Dawley has never been canceled or annulled; I never at any time or in any place agreed to destroy this contract, nor told Dawley it should be destroyed, nor that the contract was at an end, discharged

or canceled; Dawley completed the tunnel as per contract (X) I believe, in the latter part of 1874, and I paid Dawley in full according to the terms of the contract on or before the completion of the same; Dawley contracted and agreed with me to extend the Caribou tunnel one hundred feet south of the Caribou mine; the price per foot to be paid said Dawley for the driving of said tunnel was not to exceed thirty dollars; this agreement was entered into in the latter part of 1873 or the early part of 1874; Dawley was never authorized or empowered by me in any manner or form whatever to employ men for me to work on the Caribou tunnel either north or south of the Caribou lode, and in no instance did I ever authorize him to incur any indebtedness for such work, or for any work on such lodes connected with the Caribou tunnel or the Caribou lode: I have paid Dawley in full and the entire amount due him for the work done on the said Caribou tunnel south of the Caribou lode; I paid this money in installments at different intervals of the work in checks and drafts; I never did business under the name of the Caribou Tunnel or the Caribou Tunnel Company, and never knew of any business being transacted under either of these names; I never authorized or empowered James M. Dawley to do business for me under such name or names; I first learned that Dawley assumed or claimed that he could bind me under such name or names in the latter part of 1875; I had a conversation with Frank C. Young, cashier of plaintiff, in New York, in 1875, in respect to the notes sued on in this case. In my conversation with Mr. Young I emphatically informed him that Dawley had no authority whatever to give the notes now sued on, and that I was not legally or morally responsible for the same. Mr. Young informed me the bank would sue for the payment of the notes; I never requested James M. Dawley to keep the account of the work done on the Caribou tunnel or lodes connected therewith in the name of the Caribou Tunnel or the Caribou Tunnel Company, and I never made any suggestions whatever as to how he should keep his accounts; I heard James M. Dawley testify in the Boulder County District Court in July, 1876; I requested Dawley to send ac-

counts monthly to A. L. Scoville & Co., showing all money he had received from me or from said A. L. Scoville & Co.; I never promised to pay the notes sued on in this case or the amount thereof, or any amount whatever included in these notes; I knew David B. Miller; he was in Colorado in July, 1875, to render assistance to my attorneys; he had no authority from me whatever to incur any indebtedness due or claimed to be due from me; I heard my letter read in the Boulder County District Court relative to recording lodes struck in the tunnel, whether known or not; I gave these instructions to Mr. Dawley, in accordance with the law of Colorado governing the ownership of lodes struck in driving tunnels. I have banked with the plaintiff in this suit, and with the plaintiff's predecessors, Thatcher, Standley & Co., having had money deposited with them over three years; I had money on deposit with plaintiff to my credit during the fall of 1875; my balance during that period being about five hundred dollars; this money was drawn out by D. B. Miller about the 22d day of July, 1876, on an order from me; I think I first learned that plaintiff was claiming an indebtedness against me in the latter part of 1875; can not state from whom I learned it; I was not in anywise indebted to James M. Dawley in December, 1874, or at the time of the date of the notes sued on for work done on the Caribou tunnel, or on any lodes worked by Dawley, in connection with said tunnel, nor was I indebted to him on any matter whatever; the payment of the \$1,700 by me to the said James M. Dawley, in May, 1875, was subject to my contract with Dawley, and any other money which I may have paid him about that time was likewise paid on account of the contract; I did not know at that time that Dawley claimed to be my agent; I had no knowledge of the execution of the note sued in this case, and I had no knowledge whatever of any claim of the plaintiff upon me for any money advanced by it to James M. Dawley; Dawley did work on the lode cut by the tunnel, after said tunnel had reached the Caribou lode; Dawley claimed his proportion of the net profits of working said lodes during the time he was working on the tunnel south of the Caribou lode, the same as he had before the tunnel had reached the Caribou lode; Dawley claimed the right to such net profits under the con-

tract hereto annexed (marked X); James M. Dawley was never at any time authorized or empowered by me in any manner or for any purpose to contract any indebtedness, or to employ any men to work for me, or to make any settlement or statement of account with any one for me; he was not authorized to keep any account of mine with any bank or bankers, or to give any instrument in writing that could bind me in my name, or in any other name; I was first informed of Dawley claiming so to do in the latter part of the year 1875; I did repudiate such claims and wrote Dawley to that effect at once; I am acquainted with Joseph A. Thatcher; I have no recollection of having any conversation with Mr. Thatcher in reference to this claim; In the year 1873, in a conversation with Mr. Thatcher, he inquired of me very particularly regarding the financial responsibility of James M. Dawley, remarking at the same time that Dawley was indebted to his bank in the sum of \$2,000, or more; in answer to his questions regarding the financial standing of Dawley, I replied that I could not inform him as to Dawley's responsibility financially."

Cross-examination: "Dawley was to run the Caribou tunnel under the first contract until it cut the Caribou lode; I paid Dawley at different intervals during the progress of the work, in drafts, currency and checks, upwards of twenty-six thousand (\$26,000) dollars; I employed Dawley to run the tunnel south of the Caribou lode, in the autumn of 1874; he run this tunnel about 80 feet; at the time of the completion of the first contract to run the Caribou tunnel, Dawley was personally indebted to me for several thousand dollars, which I had advanced him over and above the money actually due him; by the provisions of the contract a portion of this money owed me by Dawley was applied as payments on the second contract; in addition to this, I made payments of money to Dawley in the spring of 1875, at the time Dawley had driven the tunnel 80 feet south of the Caribou lode; he was indebted to me in the sum of over \$10,000 for over-payments in the contracts in drafts and checks; I knew of the work done by Dawley on the Caribou tunnel, and lodes cut by said tunnel at the time it was progressing; this work was to be paid for according to the terms

of the contract; do not recollect of ever having received a letter from Joseph A. Thatcher on the subject of the claim of plaintiff, and do not recollect writing him on that subject; I admitted during the trial of the case of Clarence A. Sherwood against me in the U. S. District Court at Denver, on or about 2d day of August, 1877, that Dawley and myself were to share the profits of working the lodes cut by said tunnel, I to have three-fourths and Dawley to have one-fourth interest, and if there were losses, we would share it in like proportion; not that I was under any legal obligation to Dawley to share in the losses, but taking into consideration his indebtedness to me, I was willing to deal leniently with him in his losses.

(Signed)

ABEL D. BREED."

Defendant offered in evidence the contract above referred to between Abel D. Breed and James M. Dawley, marked X, as follows:

"This agreement made and entered into this third (3d) day of August, A. D. 1872, between James M. Dawley, party of the first part, and Abel D. Breed, party of the second part, witnesseth: That for and in consideration of the payments, agreements and stipulations hereinafter to be specified, the said party of the first part agrees and covenants with the said party of the second part, to drive the Caribou tunnel (so called), owned by said Breed, from its present face (about seventy-five feet from its entrance), until it cuts the Caribou lode, whatever the distance may be; to construct said tunnel of the following dimensions, viz.: To be seven (7) feet high in the center, to be six (6) feet high on each wall from the bottom to the turn of the arch, the said arch to be sprung for a tunnel eight (8) feet wide, and the width of said tunnel to be five (5) feet in the clear.

The said party of the first part further agrees to devote his time and energies to the prosecution of the work so as to complete said tunnel to the Caribou lode at the earliest practical period of time. He also agrees not to claim any lodes discovered or struck in said tunnel, but to notify said Breed or his agent, of the striking of such lodes as may be found, at his first opportunity, that they may be recorded.

He also agrees not to claim or remove any ore from the Caribou lode, by virtue of this agreement.

In consideration of the above covenant and agreements, the said party of the second part agrees to and with the said party of the first part, to pay him for running the aforesaid tunnel to the Caribou lode, the following prices per ft., viz.: for the first one hundred (100) ft. from the present face of the tunnel, five (\$5.00) dollars per foot. For the second one hundred (100) feet, seven (\$7.00) dollars per foot. For the third (3d) one hundred (100) feet, nine (\$9.00) per foot. For the fourth (4th) one hundred (100) feet, eleven (\$11.00) per foot. For the fifth (5th) one hundred (100) feet, fourteen (\$14.00) per foot. For the sixth (6th) one hundred (100) feet, eighteen (\$18.00) per foot. For the seventh (7th) one hundred (100) feet, or for so many feet as may be found to remain between a point six hundred (600) feet from the present face of the tunnel and the Caribou lode, twenty dollars (\$20.00) per foot. The said party of the second part further agrees to furnish lumber for a track, a car for removing the ore and waste rock, and also such appliances and power as may be found requisite to drive air into the tunnel, whenever artificial ventilation becomes necessary. The said party of the second part further agrees that the said Dawley shall have one-fourth ($\frac{1}{4}$) of the net profits on all ore he may extract from each and all of the veins or lodes he may strike in the prosecution of the work for a period of twelve months from the date of striking such lodes. It is further mutually agreed and understood that during the joint occupation and use of said tunnel and track for the removal of ore, that neither party shall have the preference, but that the arrangements shall be equitable and fair.

In testimony whereof we have set our names and affixed our seals, on the day and the year first above written.

J. M. DAWLEY, [L. S.]

A. D. BREED, [L. S.]”

Witness:

SAM'L CUSHMAN.

[Int. Rev. 6c.]

Plaintiff objected to the admission of the same, “because it is irrelevant; applies to work done north of the Caribou lode, and before the incurring of the indebtedness, and had nothing to do with any work south of the Caribou lode, and can have nothing to do with this case.”

The court sustained the objection, and defendant excepted.

Defendant offered in evidence the article of agreement between Abel D. Breed and the Mining Company Nederland, (marked Y), as follows:

"This article of agreement made by and between Abel D. Breed, of the city of Cincinnati, of the first part, and the Mining Company Nederland of the second part, witnesseth: That the said party of the first part being desirous to insure the completion of the Caribou tunnel, located in Boulder county, Colorado, at the earliest possible moment, hereby agrees and binds himself to pay to the said Mining Company Nederland, the actual cost of finishing said tunnel from the point in the Caribou mine that it may be on the first day of January, 1874, until it intersects the tunnel now being driven by Mr. Dawley from the valley. In consideration of said payment, the said party of the second part does hereby agree to procure the said work to be done at the lowest possible price, and will furnish such supplies as they may have and as may be required for said work at cost. They further agree to give the use of their engine and hoisting machinery, when the same can be used for said work, and hoist all stuff taken from the tunnel free of cost; and that their chief agent or such person as he may designate will superintend the construction of the said tunnel free of any charge to said party of the first part, and as it is agreed by the party of the second part to commence the work on said tunnel from the mine to its face, and if in such case on account of improper location the tunnel should not connect with the portion now constructed, then the said connection between the two parts is to be made at the sole expense of the party of the second part. Whereas, the said party of the first part has already made a contract with J. M. Dawley to complete said tunnel, and whereas, he does not desire in any manner to interfere with him in the execution of the same, he hereby agrees with the party of the second part that they can make any agreement with said Dawley that they mutually agree upon, and in the event of such contract being made, the party of the first part binds himself to pay to said party of the second part, whatever price the said Dawley may agree to pay to the said party of the second part for the completion of the tunnel which, however, is in no event to exceed more than it actually cost the party of the second part to complete the said work; but in

the event that the price agreed on between the said Dawley and said party of the second part should not be sufficient to repay the party of the second part, to complete the said tunnel in the manner heretofore described, the party of the first part hereby agrees also to pay such sum as may be the difference between the amounts agreed upon by said Dawley and the actual cost of the work. For the purpose of avoiding disputes as to the actual amount of the cost of said work, it is hereby agreed by and between both parties to this agreement, that the statement of cost made in writing and certified to as being correct by P. H. Van Diest, Esq., the chief agent of the Mining Company Nederland, shall be conclusive as to the cost, and the said party of the first part agrees to pay the same on demand of the second party to this agreement. In the event that the agreement made between said Dawley and the party of the second part should allow them more than the actual cost to run the said tunnel, then the said parties of the second part agree to repay to said Dawley the amount of said excess.

In witness whereof our hands and signatures, this the 19th day of December, 1873.

A. D. BREED. [L. s.]

For Mining Company Nederland.

Witness:

P. H. VAN DIEST, [L. s.]

WM. F. ALLEN.

Agent."

Plaintiff objected thereto for the following reasons:

"It is irrelevant; applies to work north of the Caribou lode, and before the incurring of the indebtedness, and has nothing to do with any work south of the Caribou lode, and can have nothing to do with this case. This article of agreement is between A. D. Breed and the Mining Company Nederland, and refers to work done north of the Caribou lode, and before the tunnel cut the lode."

Objection sustained by the court, and the defendant excepted.

Defendant offered in evidence the letter referred to by witness Dawley, and statement inclosed therewith, from J. M. Dawley to A. L. Scoville & Co., (marked Z) as follows:

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"CARIBOU, Oct. 13th, A. D. 1874.

A. L. SCOVILLE & Co., *Gents*:

Inclosed find statement of journal and cash book entries made here since last statement sent you by Mr. Breed; also map of Caribou tunnel which Mr. Breed forgot to take. Please hand it to him on his arrival. The tunnel is looking splendid. Please acknowledge the receipt of papers and oblige,

Yours respectfully,

J. M. DAWLEY."

Journal entries since last statement made March 5, 1874.

"Oct. 12.

Caribou Tunnel,	\$2,168 00	
To J. M. Dawley,		\$2,168 00

For running tunnel March and April and
since last measurement, 16 ft. @ \$18.00
per foot, 288 00

Also running tunnel 94 ft. @ \$20.00 per
foot, 1,880 00

The above completes the contract to the Caribou Tunnel.

Oct. 13. J. M. Dawley,	\$2,251 66	
To Mining Co. Nederland,		\$2,251 66

For running tunnel from Caribou mine to intersection with
Dawley, 80 ft. 5 in. @ \$28.00 per foot."

Defendant rested.

Plaintiff, in rebuttal. J. A. Thatcher recalled and testified as follows:

"I heard the deposition of A. D. Breed read; I do not recollect of having any conversation with him about Dawley's financial condition in 1874; I never stated to him that Dawley was indebted to the bank in the sum of \$2,000; Dawley was never indebted to the bank in the sum of \$2,000; at one time he owed the personal debt as I testified to; \$400 or \$500, I think; that was a year before this debt; he gave his own personal note and paid it."

Which was all the evidence introduced on the trial of said cause.

The instruction numbered thirteen and referred to in the opinion was as follows: "The court instructs the jury that

the employment of a person as agent to do work in a tunnel or mine does not authorize such person to borrow money for the purpose of carrying on the work or to pay for work already done by him, and unless plaintiff has shown authority other than that of Dawley's employment, to borrow the money for which suit is brought, then plaintiff can not recover in this action."

H. M. & W. TELLER, for appellant.

BELFORD & REED, for appellee.

THATCHER, C. J.

Evidence was introduced by plaintiff tending to show that Dawley, during and after the spring of 1873, acted as agent or superintendent of Breed; that he continued so to act until and at the time he borrowed money from the bank, for the recovery of which this suit was brought. The contract between Dawley and Breed, if introduced in evidence, would have tended to show that at the time it was entered into, and so long as it remained in force, Dawley was a contractor, and not a superintendent or agent. If the terms of the contract were by verbal agreement, as Breed testifies, made also to apply to the construction of the tunnel *south* of the Caribou lode, except so far as related to the price per foot to be paid by Breed, the agreement itself furnishes the best evidence of the relation that existed between him and Dawley, and tends to show that the southern extension of the tunnel was constructed by Dawley as a contractor. There is also evidence that in the spring of 1873, the written contract between Dawley and Breed was, by mutual consent, rescinded, and that thereafter Dawley acted as superintendent. These controverted questions of fact touching the nature of the agreement between Breed and Dawley, during and after the spring of 1873, until the autumn of 1874, and the nature of the agreement thereafter under which the tunnel was extended south, were properly questions for the jury, in the resolution of which they might be aided by reference to the original contract which should have been admitted in evidence. The course of Daw-

ley's dealing with Breed from which Dawley's agency might be inferred, was before the jury. As tending to repel such an inference, at least, so far as relates to the tunnel north of the lode, the August contract was admissible. Nor is it entirely clear from the evidence whether the amount of the overdraft was paid out on account of work in the tunnel north or south of the lode. If paid out on work north of the lode, and under the August contract, the question as to whether it enured to the ultimate benefit and use of Breed would not ordinarily be material; for in such case Breed, if he had learned of the loan and expenditure, could not, by silence, be construed to have ratified Dawley's act in securing it. His only duty would have been to respond to Dawley for work on the tunnel at so much per foot according to the contract. It could not properly be said in such case that the money was expended for Breed's use, but for the use of Dawley. There is some evidence tending to show that the contract between Mining Company Nederland and Breed was entered into with the knowledge and consent of Dawley, and that he (Dawley) did work in pursuance of its provisions.

This contract tended, in connection with other evidence, to impeach Dawley's testimony concerning the annulment of the former agreement. The court, we think, erroneously excluded it. With a view to determine Dawley's status, both written contracts should have been considered in the light of all the evidence.

If Dawley was by Breed appointed mining superintendent, to oversee and direct the construction of the Caribou tunnel, either north or south of the lode, with authority to employ men to work in the tunnel and operate the mines that might be found therein; if further, from time to time Breed furnished money to Dawley to pay the employes, and Dawley placed such money to his individual credit at the bank, checking out the same as it was needed to pay the laborers, was he, by virtue of his employment as such mining superintendent, in the absence of any special authority in that behalf, authorized to borrow money to enable him to prosecute the work in the tunnel, or to pay for work already done therein, and bind his principal to its payment?

If it be conceded that although the bank account stood in

the name of Dawley it was in fact Breed's account, kept in Dawley's name, by agreement of parties, and that Dawley had authority to draw thereon, it does not follow that he was authorized to *borrow* money from the bank on account of his principal. Even if he had been acting under a general power of attorney to draw checks or drafts in the name of his principal, he would have no authority, under such power, to make an overdraft, which is one form of borrowing money from the bank: *The Union Bank v. Mott*, 39 Barb. 180.

The giving of the following instruction is assigned for error:

"The court instructs the jury that if they believe from the evidence, that Dawley was the agent of Breed, in the work of employing and superintending men at work upon the lodes and the tunnel, and that Dawley was not running the tunnel south of the Caribou lode at so much per foot, but that he was employing the men and incurring the expense incident thereto, with Breed's knowledge and consent, and that the men were at work for Breed, and that Breed requested Dawley to keep the bank account in Dawley's name instead of Breed's, and that that was the reason that Dawley kept the account in his own name, that really belonged to Breed; then you may, under the law, find that Dawley had implied power *to overdraw*, to pay those men and other necessary expenses."

That a mining superintendent, by virtue of his employment as such, has the power to borrow money in the name of his principal, in the absence of express authority, or authority which must necessarily be inferred to exist from the course of dealing between himself and his principal, is a doctrine which we can not sanction.

All the hypotheses enumerated in the instruction may co-exist, and still the principal not be liable. The power of an agent to draw on a principal's funds, is entirely different from the more comprehensive power to draw on his credit. The former does not include the latter. The superintendent may have the authority to employ men to prosecute the work; if so, and funds be not furnished, the principal, and not the superintendent, is liable to the workmen. The superintendent is not authorized to exercise a power not conferred, by entering into a contract with third persons, for the loan of money with which to discharge even the lawful debts of his principal.

Had there been previous overdrafts to the knowledge of his principal, which he had subsequently paid, a just deduction might be drawn as to Dawley's authority to borrow by way of overdraft. But this view of the case is not presented by the instruction, nor do we think the evidence would justify it. Neither by note nor overdraft on a bank, can a mining superintendent, as such, bind his principal.

In the case of *New York Iron Mine v. First National Bank of Negaunee*, Albany Law Journal of 1878, p. 489,¹ (not yet reported in the published opinions), the Supreme Court of Michigan very fully considered the question as to whether a general mining agent, without being specially empowered so to do, has authority to make a promissory note in the name of his principal. The court denied the authority, holding that the owner of the note could not rest its case on the implied power of the general agent; that the issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining, and that it is so susceptible of abuse to the injury, and indeed to the utter destruction of the principal, that it is wisely left by the law to be conferred or not, as the prudence of the principal may determine.

² In *McCullough v. Moss*, 5 Denio, 567, it was held that the president and secretary of a mining corporation, could not bind the corporation by a note made in its name, without proof of their authority to execute it.

³ In *Union Gold Mining Co. v. Rocky Mountain National Bank*, 2 Col. 248 and 565, the court held that the superintendent of a mining company has no authority, by virtue of his office merely, to borrow money on the credit of the corporation by note, overdraft or otherwise. We discover no sufficient reason for departing from what may be considered as the settled doctrine in this State, on this subject. We must conclude that the instruction under consideration, as it is not in harmony with the views here expressed, was liable to mislead the jury as to the law of the case, and therefore, was erroneously given. This instruction is inconsistent with instruction numbered thirteen.

¹ *Ante*, 453.

² *Post* STOCK.

³ *Ante*, 432.

Whether Breed, by his course of dealing with Dawley, held him out to the world as an agent, authorized to borrow money to carry on mining operations, is a question which upon all the facts, is for the jury, and upon which we now express no opinion.

If Dawley was without original authority to borrow money on behalf of his principal, but did in fact so borrow, and used it in a manner advantageous to the party to be charged, the ratification of his unauthorized act may be inferred from the silence of the principal after knowledge of the facts. It is his duty, if he does not acquiesce in the unauthorized act, to repudiate it. If he fail to do so within a reasonable time after notice, the jury may draw an inference of ratification; but no estoppel is created if the unauthorized transaction is complete before knowledge of it reaches the alleged principal, and the status of the parties would not be changed by his failure to approve or disapprove within a reasonable time: *Union Gold Mining Co. v. Rocky Mountain National Bank*, 2 Colo. 248.

Judgment reversed.

1. Party dealing with agent must know the extent of his authority: *Alexander v. Cauldwell*, 33 N. Y. 480; *Post EVIDENCE*; *Chew v. Henrietta Co.*, 2 Fed. R. 5; 9 Rep. 704; *Post CORPORATION*.

2. Custody of books pending settlement of accounts with company: *Atwood v. Ernest*, 13 C. B. 881.

3. Account against agent, for inconsistent profit: *Collins v. Case*, 23 Wisc. 230; 1 M. R. 91; *Hardy v. Stonebraker*, 31 Wisc. 640; *Post FRAUD*; *Hargrave v. King*, 5 Ired. Eq. 430; *Post LEASE*; *McAleer v. McMurray*, 58 Pa. St. 126; *Post FRAUD*; *Simons v. Vulcan Co.*, 61 Pa. St. 202; *Post FRAUD*.

4. Superintendent not entitled to miner's lien: *Smallhouse v. Kentucky Co.*, 2 Mont. 443; *Post LIEN*.

5. Effect of subscription of the word "agent," "superintendent" &c., to bill or note: *Conro v. Port Henry Co.*, 12 Barb. 27; *Gerber v. Stuart*, 1 Mont. 172; *Post BILLS AND NOTES*; *Jones v. Clark*, 42 Cal. 180; *Post PARTNER*; *Laflin Co. v. Sinsheimer*, 48 Md. 411; *Post BILLS AND NOTES*; *Shaver v. Ocean Co.*, 21 Cal. 45; *Post BILLS AND NOTES*.

6. Effect of ratification of agent's acts: *Conro v. Port Henry Co.*, 12 Barb. 27; *Kahn v. Hamilton*, 2 Utah, 115; *Post TRUST*; *St. Louis Co. v. Tierney*, 2 Colo., L. R. 245; *Post CONTRACT*; *Yellow Jacket Co. v. Stevenson*, 5 Nev. 224; *Post CORPORATION*.

7. A superintendent is not a "laborer or servant" under Personal Liability Act: *Dean v. DeWolf*, 16 Hun, 186; *Krauser v. Ruckel*, 17 Id. 463.

8. Action for agents' traveling expenses: *Duff v. Maguire*, 107 Mass. 87; *Post PROSP. CONTRACT*.

9. Removal of agent: possession held by agent: *Flagstaff Co. v. Patrick*, 2 Utah, 304; *Post* CORPORATION.
10. Principal liable for agent's fraud: *Herbert v. King*, 1 Mont. 475; *Post* EJECTMENT; *Law v. Grant*, 37 Wisc. 548; *Post* FRAUD.
11. Partners liable for trespass of agent: *McKnight v. Ratcliff*, 44 Pa. St. 156; *Post* PARTNER.
12. Agency, how proved: *Santa Clara Association v. Meredith*, 49 Md. 389; *Post* CORPORATION.
13. Felony, by means of innocent agent: *Reg. v. Bleasdale*, 2 Car. & K. 765; *Post* CRIMES.
14. Superintendent working without orders: *Sherman v. Clark*, 4 Nev. 138; *Post* INJUNCTION.
15. Agent, in possession as agent, not liable for rent: *Stewart v. Perkins*, 3 Oregon, 508.
16. Not liable for employer's negligence: *Stone v. Cartwright*, 6 D. & E. 411; *Post* MASTER AND SERVANT.
17. Notice of discharge of agent: *Van Dusen v. Star Co.*, 36 Cal. 571; *Post* CONTRACT.
18. Personal knowledge of agent distinguished from knowledge of corporation: *Wickersham v. Chicago Co.*, 18 Kan. 481; *Post* ESTOPPEL.
19. Death of agent annuls authority of substitute: *Lehigh Co. v. Mohr*, 83 Pa. St. 228; 24 Am. R. 161.

AH YEW V. CHOATE.

(24 California, 562. Supreme Court, 1864.)

Foreign miners' license. The acts of 1860 and 1861, relating to foreign miners' licenses, are substantially the same, and do not refer to mines contained in lands which are the private property of individuals, but only to mines in the public lands of the State or United States.

Criterion between agricultural and mineral lands. The boundary between mineral and non-mineral lands, can not not be defined with certainty, but perhaps the true criterion would be to consider whether upon the whole the lands appear to be better adapted to mining or other purposes. It is the duty of the officers of the government to determine whether the lands are mineral or not, before making a grant.

Patent. The patent is the record of the State that the land was subject to location, and has been located pursuant to the terms prescribed by law, and in this case it is also a record of the judgment of the State that the characteristics of the land were not such as to constitute mineral lands; and the verity of this record is not overthrown by the fact that the land contains sufficient gold to induce the plaintiff to mine it for that metal.

Appeal from the District Court of Placer County, Eleventh Judicial District.

The plaintiff in his complaint alleged that he was a native of China and that defendant was the collector of foreign miner's licenses. That in accordance with the act of April 23d, 1858, entitled "An act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes, and the seventy-two sections donated to this State for the use of a Seminary of Learning" the State of California had by its agents selected a certain tract of land, therein described as a portion of the seventy-two sections donated to said State for the use of a Seminary of Learning, and that said location was before the patent issued, approved by the government of the United States; that afterward the State sold said land to Stephen D. Burdge, and gave him a certificate of purchase; that Burdge

paid the State for the land, and duly advertised that he would apply for a patent; and that afterward, T. L. & L. R. Chamberlain became the assignees of said Burdge's interest in the land; and the State of California, on the 2d day of June, 1863, issued to them a patent for the same; that plaintiff is and for more than two months has been in the possession of a portion of said land, as the lessee of said Chamberlain, and has been engaged in mining on the same, and working several men, and taking out from fifteen to twenty-five dollars per day in gold dust, and can continue to do so until his lease expires, which will be December 21, 1863; that the defendant on the 23d day of September, 1863, demanded of plaintiff the sum of four dollars for a mining license or tax for September, 1863; that plaintiff refused to pay, and defendant seized and levied upon the leased premises, and has advertised the same for sale for non-payment of the mining license, and fixed the day of sale for September 30, 1863, at two o'clock P. M.; that the sale will create a cloud upon plaintiff's title, etc., etc.

The complaint prayed for an injunction restraining the sale. The defendant demurred to the complaint but the demurrer was overruled and judgment was rendered for plaintiff as prayed for, and the defendant appealed.

JO HAMILTON, for appellant.

GEORGE CADWALADER, for respondent.

By the Court, SAWYER, J.

It was held in *Ah Hee v. Crippen*, 19 Cal. 497, and we think correctly, that the sixty-fourth section of the Revenue Act of 1860, does not refer to mines contained in lands which are the private property of individuals, but only to mines in the public lands of the State or United States. The provisions of the Revenue Act of 1861 are substantially the same upon this point as those of the act of 1860, and must receive the same construction. If, then, the fee of the land upon which the plaintiff was mining was in his landlord, that decision is decisive of this case, and the plaintiff is not liable to pay the license sought to be collected.

The plaintiff is mining upon lands patented to his lessors as school lands, under the act of April 16, 1859. Section eight provides that "nothing in this act shall be construed so as to authorize or confirm the location or purchase of any of the mineral, swamp, or overflowed lands in this State as school lands:" Laws 1859, p. 340. The question is, do the allegations of the complaint show a title in fee in the plaintiff's lessors? It appears from the averments of the complaint, that under a lease from the patentees, and with their permission, the plaintiff is working several men, and taking out gold to the value of from twenty-five to thirty dollars per day. The defendant, a collector of the foreign miner's license tax, insists that it appears from the foregoing allegations of the complaint that the lands referred to are mineral lands, and that the patent is therefore void. All lands containing gold are not necessarily mineral lands within the meaning of the section under consideration. Probably there is very little land within the basin formed by the Sierra Nevada and Contra Costa ranges of mountains that does not contain more or less of the precious metals. It may turn out that much of the land now regarded as suitable only for pasturage and agricultural purposes contains sufficient quantities of gold to justify the expense of extracting it by mining; yet, in the present state of our knowledge upon the subject, it could not be called mineral lands. It is not easy in all cases to determine whether any given piece of land should be classed as mineral lands or otherwise. The question may depend upon many circumstances: such as whether it is located in those regions generally recognized as mineral lands, or in a locality ordinarily regarded as agricultural in its character. Lands may contain the precious metals, but not in sufficient quantities to justify working them as mines, or make the locality generally valuable for mining purposes, while they are well adapted to agricultural or grazing pursuits; or they may be but poorly adapted to agricultural purposes, but rich in minerals; and there may be every gradation between the two extremes. There is, however, no certain, well defined, obvious boundary between the mineral lands and those that can not be classed in that category. Perhaps the true criterion would be to consider whether upon the whole the lands appear to be

better adapted to mining or other purposes. However that may be, in order to determine the question, it would, at all events, be necessary to know the condition and circumstances of the land itself, and of the immediate locality in which it is situated. It is the duty of the officers of the government having the matter in charge, before making a grant, to ascertain these facts, and to determine the problem whether the lands are mineral or not. In this instance the lands appear to have been surveyed with a view of bringing them into market, for they are described by range, township, and section, "according to the official survey of the United States." It is alleged that the location was approved by the government of the United States; that the purchase money was paid to the State of California; that the notice of intention to apply for a patent was published, as required by law, and that the patent set out in the record was duly issued by the State.

The regular proceedings prescribed by law, then, have been taken, and the officers of the government have ascertained these facts, and adjudged the lands to be subject to be granted. In the language of Mr. Chief Justice Field, in *Doll v. Meador*, 16 Cal. 324, the patent "is the record of the State that the land was subject to location under the grant of the United States, and has been located through its officers in pursuance of the terms of the donation;" and we may add in this case, that it is also a record of the judgment of the State, by its officers duly appointed for that purpose, that the conditions and characteristics of the land were not such as to constitute it mineral lands within the meaning of the provisions of the statute, and the verity of this record is not overthrown by the mere fact appearing in the complaint that the land patented has been ascertained to contain a sufficient amount of gold to induce the plaintiff to mine it for that metal. *Prima facie*, the complaint shows a title in fee in the patentees, the parties under whom the plaintiff holds. The patent is valid upon its face, and it is only upon matters *dehors* the instrument that it is attacked. And these matters relied on appearing in the complaint are insufficient to justify the court in holding—in the face of the patent, and the solemn record of the action of the State to the contrary—that the lands granted by it are mineral lands within the meaning of the statute.

This view of the case renders it unnecessary to consider the question whether this is one of the cases in which the patent can be attached collaterally, or in any mode other than by a direct proceeding on the part of the State to vacate it, or, if so, whether the defendant stands in such a relation to the State as would enable him to assail it.

The judgment is affirmed.

1. Agricultural claim located on mineral land: *Burdge v. Smith*, 14 Cal. 340; *Post* PUBLIC DOMAIN.

2. Agricultural claims subject by statute to entry of miner under certain limitations: *Stoakes v. Barrett*, 5 Cal. 37; *McClintock v. Bryden*, 5 Cal. 97; *Post* PUBLIC DOMAIN; *Rupley v. Welch*, 23 Cal. 453; *Post* DAM; *Burdge v. Underwood*, 6 Cal. 45; *Post* DITCH; *Gillan v. Hutchinson*, 16 Cal. 154; *Post* CLAIM.

3. The pre-emption laws exclude mineral lands: *Boggs v. Merced Co.*, 14 Cal. 282; *Post* MEXICAN GRANT.

4. Excepted out of railroad grants: *McLaughlin v. Powell*, 50 Cal. 64; *Post* MINERAL LANDS.

5. Contest between town lot and mineral claimant: *Martin v. Browner*, 11 Cal. 12; *Post* APPROPRIATION; *Fitzgerald v. Urton*, 5 Cal. 308; *Post* POSSESSION.

6. Mine flooded from irrigating ditch: *Gibson v. Puchta*, 33 Cal. 310; *Post* POSSESSION.

7. Protection of agricultural improvements against miners: *Ensminger v. McIntire*, 23 Cal. 593; *Post* TRESPASS; *Wixon v. Bear River Co.*, 24 Cal. 367; *Post* APPROPRIATION.

8. Agricultural patent including lode claim: *Gold Hill Co. v. Ish*, 5 Oregon, 104; *Post* PATENT.

9. Burden of proof on agricultural claimant: *The Secretary v. McGarrahan*, 9 Wall. 299.

CHAPMAN ET AL. V. TOY LONG ET AL.

(4 Sawyer, 28. Circuit Court, District of Oregon, 1876.)

Practice in equity. Parties seeking the protection of a court of equity against alleged trespassers upon a mining claim must show a substantial compliance with the law authorizing the location thereof.

Placers. Parties may locate and occupy placers jointly.

Injunction—Waste—Trespass. Courts of equity do not now make distinctions between trespass and waste, but will apply the remedy by injunction wherever a trespass is attended with irreparable mischief or a multiplicity of suits, the same as if it were a technical waste, and this doctrine is particularly applicable to the case of a continued trespass upon a placer gold mine.

Right of possession and appropriation. The right of a locator of a mining claim to the possession of his claim, and to appropriate the mineral therein is full and complete, so long as the existing mining law remains in force.

Mining rights confined to citizens. The license to explore, occupy and purchase any of the lands of the United States containing minerals is confined to citizens of the United States, and to those who have declared their intention to become such, under § 2319, Rev. Stat. U. S.; though when there was no legislation upon the subject, the assumption that the occupant was in possession with the consent of the United States, applied as well to aliens as to citizens.

Treaty with China. Provisions in mining regulations, as well as in the State constitution, which forbid Chinamen from working in a mining claim, are in direct conflict with Art. 6 of the treaty with China, of July 28, 1868, and therefore void. Under that treaty Chinamen have the right to follow any lawful calling which is open to the subjects of the most favored foreign powers.

Before DEADY, District Judge.

Motion for a Provisional Injunction.

B. F. DOWELL and ADDISON C. GIBBS, for complainants.

WALTER W. THAYER, for defendants.

DEADY, J.

The complainants, Matthias Chapman, Aaron B. Klise, James Herd, Lorenzo A. Sturgis, and John M. Chapman, allege in their amended complaint that they are citizens of the United States, and that Toy Long and his four co-defendants are "yellow alien Chinamen, who have not declared their intention to become citizens of the United States;" that on February 21, 1875, the miners of Poorman and Jackass Creeks district, situate in Jackson county, State of Oregon, duly established rules and regulations for the mines in said district, by which a "claim was declared to be one hundred yards square," and every citizen of the United States allowed to hold one creek and one bank claim by location; that said rules and regulations were duly recorded in said county on February 24, 1876; that on February 28, 1876, the complainants, acting under said rules and regulations, and the act of Congress of May 10, 1872, "to promote the development of the mining resources of the United States," duly located and caused to be surveyed by the proper United States surveyor, certain mineral lands particularly described by metes and bounds on said Poorman Creek, lying in township 38 south and 3 range west, of the Wallamet meridian, constituting a parallelogram 20 chains in length and 9-10 chains in width; that on February 29, 1876, the complainants duly posted a notice of their claim to said lands, and caused a copy of the same to be recorded in said county, and a certified copy of such record to be duly posted on said premises on April 15, 1876, of all which the defendants had due notice; that the legal title to the premises is in the United States, and the complainants are entitled to the possession of the same for the purpose of mining for the gold therein, and that such possessory right is of the value of \$600.

That the defendants, on said February 28, and divers times between that time and the commencement of this suit—May 1, 1876—trespassed upon said premises by mining thereon and carrying away the gold from the same under a claim of right to do so, to the depreciation of the value of said premises; that the defendants are prohibited, by the act of Congress and the mining regulations aforesaid, from mining said lands; that they are insolvent and of "bad reputation for truth and veracity;" that the complainants have

no means of proving the amount of gold taken from the premises "by these untruthful defendants" except their own testimony, and that said defendants, unless restrained by the order of this court, will do irreparable damage to the premises.

The complainants therefore pray for an account, the appointment of a receiver, a decree that the pretended claim of the defendants is illegal and void, and that they be perpetually enjoined from trespassing upon said premises.

On June 6th a motion for a provisional injunction was argued and submitted by counsel, upon the complaint.

The occupation and purchase of mineral lands of the United States is regulated by Chap. 6 of Title 32 of the Revised Statutes, the same being a compilation of the pre-existing acts of July 26, 1866, July 9, 1870, May 10, 1872, and March 3, 1873, upon that subject. Section 2319 of the revised statutes declares that "all valuable mineral deposits in lands belonging to the United States" are "free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." Section 2324 of the Revised Statutes also authorizes "the miners of each mining district" to make rules "not in conflict with the laws of the United States or the State * * governing the location, manner of recording, amount of work necessary to hold possession of a mining claim," subject to certain requirements, which are briefly these: 1. The location must be marked on the ground so that its boundaries can be traced; 2. The record of the claim must contain the date of the location, "the name or names of the locators," and such a description of the claim, by reference to some natural object or permanent monument, as will identify the same; 3. The performance of \$100 worth of work or improvement on each claim located after May 10, 1872, yearly, until the issuing of a patent therefor. But when claims are "held in common," such expenditure may be made upon any one claim; and upon the failure of any one

of several co-owners to contribute his proportion of these expenditures, his interest shall "become the property of his co-owners who have made the required expenditures."

The law of the State, Oregon Code, sections 5 and 6, page 687, provides that the county clerk shall record the notice of a miners' meeting organizing a mining district, and empowers miners "to make local laws in relation to the possession of water rights and working of placer claims * * subject to the laws of the United States."

The mining laws of the district in question provide that each person shall be allowed to hold one creek and one bank claim of one hundred yards square by location; that one day's work in each week shall be done on each claim as long as there is "a ground sluice-head of water in the creek; provided, if the claims are together, the work may be done on any one of them;" that no "Mongolian or alien who has not declared his intention to become a citizen of the United States," shall hold or work any claim; that if any person shall employ any Mongolian or such alien to work on a mining claim for one month, or shall employ any Chinaman who was not in Oregon at the adoption of the State Constitution, to work such claim "for ten days before the entry of the same at the land-office," he shall forfeit the same, and it shall be open to relocation by "any eligible" person.

The reference to the adoption of the Constitution of the State grows out of Section 8, of Article XV of that instrument, which reads as follows: "No Chinaman, not a resident of the State at the adoption of the Constitution, shall ever hold any real estate or mining claim, or work any mining claim therein." This Constitution was adopted by the popular vote on November 9, 1857, but did not go into effect until the admission of the State into the Union, February 14, 1859.

Counsel for the defendants object to the allowance of the motion because it appears that the location includes too much ground—nearly ten claims of one hundred yards square, instead of five—and is therefore illegal.

As already stated, the complaint describes the premises by metes and bounds, showing them to be in form a parallelogram of about one hundred and ninety-eight yards in width,

and four hundred and forty yards in length, and lying on the right or west bank of Poorman Creek, but it contains no allegation, as it should, concerning the character of the claims inclosed within these limits, as to whether they are all creek or bank claims, or of both kinds, and if so, in what proportion. Neither does it appear that the plaintiffs are in the actual possession of the premises, but rather the contrary. Their rights then are merely such as result from having located the premises as mineral lands, under the mining laws and regulations, and that, too, over the heads of others already in the actual occupation of them. When parties, under such circumstances, seek the aid of a court of equity—even if the alleged trespassers are Chinamen, and not expressly authorized to occupy or enter mining lands—they must bring themselves within the law authorizing the location, and show a substantial compliance with its terms.

In this case, it being apparent that the land located includes more than one claim to each locator and complainant, while the local law only allows a person to locate one claim, except where one is a creek and the other a bank claim, there ought to have been a distinct allegation in the complaint, to the effect that the premises comprised an equal number of such claims. And if there is not otherwise enough in the complaint to enable the court to ascertain this fact, the location must be treated as an illegal one, and the motion for an injunction denied. But it is manifest, from the description of the premises, that this location is equally composed of creek and bank claims, and therefore may contain two to each locator. A creek claim is a tract of one hundred yards square, one side of which abuts on the creek, or rather extends to the middle thread of it, while a bank claim is a tract of the same size lying back of and abutting upon a creek claim. This being so, all the land in this location between the creek and a line parallel thereto, and one hundred yards distant therefrom, is creek land, while that lying west of such line is bank land.

The complainants being each entitled to locate a creek and bank claim, together they might have included a tract on the creek two hundred yards wide and five hundred yards long. As it is, they have only taken about ninety-seven thousand yards, or nine and one-half claims, instead of the one hundred

thousand yards, or ten claims, which the law in its wisdom allowed them.

For this act of self-denial "the heathen Chinees," who appear to have no rights on Poorman Creek that a miner is bound to respect, and who had probably bought this ground and long worked it as their own, are doubtless duly thankful. Yet, to compare small things with great, if at some distant day the moral of this predatory transaction should be called in question, the defendants will hardly have cause to exclaim with Lord Clive, when charged in the House of Commons with helping himself to the treasury of Bengal after the signal victory of Plassey: "I am astonished at my own moderation."

On the argument of the motion it was also objected to the location, that parties could not locate placer claims jointly. But I find nothing in the law or regulations, or the nature of things to support this proposition. On the contrary, section 2324 of the Revised Statutes makes express mention of "co-owners" of mining locations, without reference to the fact of whether they are upon "placers" or rock in place; and provides for forfeiting the interest of any of such co-owners who may fail to contribute his share of the expenditures required by law, while section 2330 expressly provides for the joint entry and patent of contiguous placer claims owned by two or more persons, which necessarily implies that they may be located and occupied jointly before such purchase.

It is also insisted that the complainants must first obtain possession of the premises by an action at law before a court of equity will interfere to restrain the defendants from committing the threatened trespasses.

The remedy by injunction was once confined to waste, or cases of trespass between parties who were privies in title, such as landlord and tenant, mortgagor and mortgagee, tenant of the particular estate and remainder man, and in those cases the complainant was of course not in possession. But the distinction between the trespass technically called waste, and the ordinary trespass between parties who are strangers or claiming adversely to one another, has been gradually disregarded by courts of equity, until it can not now be said to exist. Wherever a trespass is attended with irreparable mis-

chief or a multiplicity of suits or vexatious litigation, the remedy by injunction will be applied the same as if it were a technical waste: Story's Eq. J. secs. 918, 928; Ad. Eq. 109. An injunction is now allowed in all cases of trespass upon mines, upon the ground that the acts complained of are, or may be, an irreparable damage to this particular species of property: Id. sec. 918; *Livingston v. Livingston*, 6 John. Ch. 499; *Merced Mining Co. v. Fremont*, 7 Cal. 320. And this doctrine is particularly applicable to the case of a continued trespass upon a placer gold mine—the value of which consists wholly of auriferous deposits, that may be worked out and removed without leaving any evidence of their quantity or value upon which to base an estimate or account, as in the case of coal, stone, and other minerals not precious. If, then, the complainants, by their location, have acquired a right to possess the premises and appropriate the minerals contained therein, the defendants can have no such right, and the exercise of it by them is an irreparable injury to the interest of the complainants, and the latter are entitled to the injunction asked for. Prior to the passage of the acts aforesaid concerning the mineral lands, strictly speaking, all persons who occupied them for the purpose of mining, were naked trespassers, at least as against the United States. As between the first occupants and third persons, from the necessity and convenience of the case, the courts held that the former were not trespassers, and were entitled to the protection of the law as persons in the possession of portions of the public domain, with the assumed assent of the owner: *Merced Mining Co. v. Fremont*, *supra*, 319; *People v. Shearer*, 30 Cal. 655. But under the mining laws of the United States now in force, the locator of a mining claim, as to the right to the possession of the premises and to appropriate the minerals therein, becomes and is the assignee of the United States so long as the law remains in force and he complies with the conditions imposed by it. Until Congress withdraws this license by a repeal of the law, the right of the locator to the possession of his claim and to appropriate to his own use the mineral deposits therein is full and complete, and he need not take any steps to purchase the land or obtain a patent for it. That is a matter left to his own option or sense of self-interest.

It is admitted that the complainants have taken all the steps necessary to make a technical location of this ground as placer mining claims. It is not necessary that they should show that they have done any work upon it. As the law stands, they have until next February to make the required expenditure upon it for the first year. Their right, then, under the law and regulations to the possession of the ground, and to appropriate the minerals found in it, is perfect, unless the occupancy of the defendants, at the time of the location, had the effect to exclude the premises from the operation of the mining acts, and therefore preclude the complainants from taking it up as mining land "belonging to the United States." With every desire to reach such a conclusion, I can not see how such an effect can be given to the prior occupation of the defendants, without disregarding the plain letter and purpose of the law. The license contained in section 2319, *supra*, to explore, occupy and purchase any of the lands of the United States containing mineral deposits, is confined to citizens of the United States, and those who have declared their intention to become such. The defendants, being aliens, are not within the purview of the law, and by an almost necessary implication, are prohibited from the exercise of the rights conferred by it. When there was no legislation upon the subject, the assumption that the occupant was in possession with the consent of the United States, applied as well to aliens as citizens, and to Chinamen, as others. But since the passage of the acts prescribing who may occupy the public lands containing mineral deposits, there can be no presumption as against a person making a location under such acts, that a person not included therein, is occupying any of such lands with the consent of the United States. As has been said, a locator under these acts, as to the possession of the soil and the appropriation of the minerals therein, for the time being, is the assignee of the United States, and as against an unqualified occupant of the premises, he is entitled to the same remedies to which his assignor would be entitled. Nominally, these acts discriminate against the alien generally, but in fact against the dreaded Chinaman only; because all aliens, including the Congo negro, except the Mongolian,

are permitted to become naturalized, and therefore qualified to locate and occupy mining lands under them.

Article VI of the treaty with China, of July 28, 1868, (U. S. Pub. Treat. 148), provides that citizens and subjects of the two nations shall respectively enjoy the same privileges, immunities or exemptions, in respect to travel or residence "within the country of the other," as may there be enjoyed by the citizens or subjects of the most favored nation.

The right to reside in the country with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers. Therefore the provisions in the mining regulations of Poorman Creek, which, in effect, forbid Chinamen from working in a mining claim for themselves or others, as well as the clause of the State Constitution, *supra*, to the same effect, seem to be in direct conflict with this article of the treaty; and if so, are therefore void. Practically the latter has always been a dead letter. Both it and the similar prohibition in relation to free negroes (Art. I, sec. 35, Or. Con.) were generally regarded, at the time of the formation of the State Constitution, as a mere piece of *brutum fulmen*, intended to quiet the fears and placate the prejudices of a certain class of voters who were supposed to stand in dread of being overslaughed by an influx of these black and yellow people.

But whether the treaty reaches the point involved in this case, is a question that has not been argued by counsel, and therefore will not now be passed upon.

Assuming that it does not, I am constrained to hold that the complainants, by their location, have, for the time being, become entitled to possession of the premises, and the right to appropriate the minerals therein to their own use; and that, therefore, the defendants, although in the peaceable possession of the claims when located by the complainants, are now in law trespassers upon the legal rights of the latter. Let an injunction issue commanding defendants to desist from working the premises until the further order of this court.

MITCHELL ET AL. V. HAGOOD ET AL.

(6 California, 148. Supreme Court, 1856.)

Forcible entry. The writ of restitution obtained in an action of forcible entry and detainer simply decides a restoration to immediate possession, and does not decide the right of property or the right of possession.

Foreigner's license. Foreigners, who are *bona fide* residents, are entitled to the same rights of property, under the constitution of California, as native born citizens; and the law which prohibits them from taking gold from the mines of that State, without first obtaining a license, can only be enforced by the State, and not by interested volunteers.

Appeal from the District Court of Placer County, Eleventh Judicial District.

Action to recover possession of a mining claim, and for an injunction restraining defendants from working the same for gold.

The defendants answered that they had obtained a judgment and writ of restitution against the plaintiffs in an action of forcible entry and detainer, and further, that the plaintiffs are foreigners, and have not obtained any license to mine, as required by law.

The court, on motion, struck out both of these defenses, to which ruling the defendants excepted. Judgment was rendered for plaintiffs, and defendants appealed.

HALE & MYERS, for appellants.

MILLS & HILLYER, for respondents.

The opinion of the court was delivered by Mr. Justice HEYDENFELDT. Mr. Chief Justice MURRAY concurred.

The court below was right in striking out the two defenses, for which error is here assigned.

1. The writ of restitution, obtained by the defendants in an action of forcible entry and detainer, does not determine the right of property, or the right of possession. It simply decides a restoration to immediate possession, which has been

taken away by an illegal and unwarranted ouster, tending to produce a breach of the peace.

2. That the parties in possession of a gold mine, and working it, are foreigners and without license, affords no apology to trespassers. . Foreigners, who are *bona fide* residents, are entitled to the same rights of property, under the constitution of this State, as native born citizens.

It is true that the law prohibits foreigners from taking gold out of the mines of this State without first obtaining a license. But this law must be enforced by the State, through her appointed officers; and the mode and manner of enforcing it are regulated by the provisions of the statute. It is not left to interested volunteers to execute the law according to their crude notions; nor upon any such plea to disturb, or seize upon, the quiet possession of others, for their own benefit.

Judgment affirmed.

EX PARTE AH PONG.

(19 California, 106. Supreme Court, 1861.)

Tax. The mere fact that a Chinaman resides in a mining district does not subject him to the foreign miners' tax.

Petition for *habeas corpus*.

The petitioner was a Chinaman and washerman, not a miner, but residing in a mining district of California. He was not eligible to citizenship in the United States. He refused to pay the foreign miner's license provided for in the act hereinafter quoted, and also refused to work out the tax upon the roads.

He was thereupon tried before a justice of the peace for a misdemeanor, found guilty, and sentenced to imprisonment in the county jail for twenty days. Application was made to the county judge of El Dorado for a writ of *habeas corpus*, and refused *pro forma*; and application was then made to FIELD,

C. J., who issued the writ, returnable before the Supreme Court.

The act of 1861, under which the proceedings against the prisoner were taken, provides that "no person, unless he is a citizen of the United States, or shall have declared his intention to become such (California Indians excepted), shall be allowed to take or extract gold, silver or other metals from the mines of this State, or hold a mining claim therein, unless he shall have a license therefor, as hereinafter provided." Section ninety-three, after authorizing the tax collector of each county to collect this license, says: "All foreigners not eligible to become citizens of the United States, residing in any mining district in this State, shall be considered miners, under the provisions of this Act." And in another section, the collector, when unable to collect the license, is to certify that fact, with the amount due, and the name and the description of the person liable to pay the same, to the road overseer of the district, who then makes a requisition upon the party to work out his license on the public roads—in default of which he is liable to be prosecuted for a misdemeanor, and subject to imprisonment for not less than five nor more than thirty days.

BYRNE & FREELON, for the petitioner.

THOS. H. WILLIAMS, Attorney-general, *contra*.

BALDWIN, J., delivered the opinion of the court—FIELD, C. J., and COPE, J., concurring.

The prisoner must be discharged. The mere fact that the petitioner was a Chinaman residing in a mining district, does not subject him to the foreign miner's tax. If the act is to be construed as imposing this tax, it can not be supported, any more than could a law be sustained which imposed upon every man residing in a given section of the State a license as a merchant, whatever his occupation.

1. Foreign miner's tax: *Ah He v. Crippen*, 19 Cal. 492; *Post MEXICAN GRANT*; *Ah Yew v. Choate*, 1 M. R. 492; *Lin Sing v. Washburn*, 20 Cal. 534; *People v. Naglee*, 1 Cal. 232; *People v. McCreery*, 34 Id. 448.

2. Alien can not locate: *Golden Fleece Co. v. Cable Co.*, 1 M. R., 120.
3. Jurisdiction of English Courts over foreign mines: *Norris v. Chambers*, 4 Law Times N. S. 345; aff'g 29 Beav. 246.
4. Naturalization of father: naturalization a question of fact: *North N. Co. v. Orient Co.*, 6 Saw. 299; *Post* LOCATION.
5. Claims of aliens not forfeitable to territory: *Territory v. Lee*, 2 Mont. 124; *Post* FORFEITURE.

¹ BELK V. MEAGHER ET AL.

(10 Wash. Law Rep. 38. Supreme Court of the United States, 1881.)

Resuming work—Act of May 10, 1872. The original locator of a mining claim has the exclusive possessory right until the time for annual labor has passed, and if before another enters on his possession and relocates the claim, he resumes and performs work to the extent required by law, his rights are precisely what they would have been, if no default had occurred; and under the act of May 10, 1872, the work may be done at any time within the entire year from Jan. 1st to Dec. 31st.

Relocation before forfeiture. A relocation of a mining claim, prior to the time when it is forfeited by failure to do the annual labor, is void; nor does it become validated by the failure of the original locator to do the work within the required period.

Relocation by third parties. A relocation by third parties made peaceably, after the time for annual labor had expired, is paramount to a relocation made before such period had elapsed, as well as against the original title.

Practice on appeal. Nothing which occurred in the progress of the trial below can be assigned for error in the Supreme Court, which was not brought to the attention of the court, and decided by it.

Proof of lost records. The original record of a location certificate having been lost, it is competent to prove the record by a book transcribed from the original, and for years recognized as part of the official records.

In error to the Supreme Court of Montana.

SAMUEL SHELLABARGER and E. W. TOOLE, for plaintiff in error.

J. C. ROBINSON and RICHARD T. MERRICK, *contra*.

Mr. Chief Justice WAITE delivered the opinion of the court.

This is an action of ejectment brought by Belk, the plaintiff in error, to recover the possession of a certain alleged quartz-lode mining claim, being, as is stated in the complaint, "a relocation of a part of what is known as the old original lode claim." Passing by for the present the exceptions taken to the rulings of the court at the trial on the admission and rejection of testimony, the facts affecting the title of the respective parties may be stated as follows:

In July or August, 1864, George O. Humphreys and William Allison located the discovery claim on the original lode and claims one and two west of discovery. These locations were valid and subsisting on the tenth of May, 1872, and no

¹ Same case, below, *post*, 522. The above case has been since officially reported in 104 U. S. 279, with which the text has been compared.

claim adverse to them then existed. No work was done on them between that date and June, 1875. During the month of June, 1875, and before any relocation had been made, the original locators, or their grantees, resumed work upon the claims and did enough to re-establish their original rights, if that could be done by a simple resumption of work at that time. No work was afterward done on the property by the original locators, or any one claiming under them, and it does not appear that they were in the actual possession of the claims, on any part thereof on the 19th of December, 1876, or for a long time before. It is conceded by both parties that the original claims lapsed on the 1st of January, 1877, because of a failure to perform the annual work required by the act of Congress in such cases.

On the 19th of December, 1876, Belk made the relocation under which he now claims, and did all that was necessary to perfect his rights, if the premises were at that time open for that purpose. His entry on the property was peaceable, no one appearing to resist. Between the date of his entry and the 21st of February, 1877, he did a small amount of work on the claim, which did not occupy more than two days of his time, and probably not so much as that, and he had no other possession of the property than such as arose from his location of the claim and his occasional labor upon it. On the 21st of February, 1877, the defendants entered on the property peaceably and made another relocation, doing all that was required to perfect their rights, if the premises were at the time open to them. The possession they had when this suit was begun, was in connection with the title they acquired in that way.

Upon this state of facts the questions presented in argument for our consideration are—

1. Whether the work done in June, 1875, was sufficient to give the original locators, or those claiming under them, an exclusive right to the possession and enjoyment of the property until January 1, 1877.

2. Whether, if it was—a valid relocation of the premises, good as against everybody but the original locators or their grantees, could be made by Belk on the 19th of December, 1876, his entry for that purpose being peaceable and without force.

3. Whether, if Belk's relocation was invalid when made, it became effectual in law on the 1st of January, 1877, when the original claims lapsed; and—

4. Whether, even if the relocation of Belk was invalid, the defendants could, after the 1st of January, 1877, make a relocation, which would give them as against him, an exclusive right to the possession and enjoyment of the property, their entry for that purpose being made peaceably and without force.

¹ By "an act to promote the development of the mining resources of the United States," passed May 10, 1872 (17 Stats. 91, chap. 152 sec. 3), it was provided that the locators of all mining locations theretofore made, or which should thereafter be made on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim then existed, should have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, so long as they complied with the laws of the United States, and with State, Territorial, and local regulations, not in conflict with the laws of the United States, governing their possessory title. By the same act (p. 92, sec. 5), it was further provided that on all claims located prior to the passage of the act, ten dollars' worth of work should be performed or improvements made each year for each one hundred feet in length along the vein, until a patent should have issued therefor, and upon a failure to comply with this condition, the claim or mine on which the failure occurred should be open to relocation in the same manner as if no location of the same had ever been made, provided the original locators, their heirs, assigns, or legal representatives had not resumed work on the claim after the failure and before the relocation. By another act passed March 1, 1873 (17 Stats. 483, chap. 214), the time for making the first annual expenditure, under the act of 1872, was extended to June 10, 1874; and by an act of June 6, 1874 (18 Stats. 61, chap. 220), to January 1, 1875. The exact language of this last act is as follows:

"That the provisions of the fifth section of the act * *

¹ For present annual labor law, see U. S. Rev. Stat. § 2324 and Sup't pp. 23, 135 and 507.

passed May 10, 1872, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act, shall be extended to the first day of January, 1875."

For all the purposes of this case, the law stands as it would have stood, had the original act of 1872 provided that the first annual expenditure on claims then in existence might be made at any time before January 1, 1875, and annually thereafter, until a patent issued. If not made by that time, the claim would be open to relocation, provided work was not resumed upon it by the original locators, or those claiming under them, before a new location was made. Such being the law, it seems to us clear that if work be renewed on a claim after it has once been open to relocation, but before a relocation is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. The argument on the part of the plaintiff in error, is, that if no work is done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875, and afterward if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law. His rights after resumption, were precisely what they would have been if no default had occurred. The act of 1874 is in form an amendment of that of 1872, and all the provisions of the old law remain in full force, except so far as they are modified by the new.

From what has thus been said, it is apparent that as work was done in the present case during the year 1875, before any relocation was made, the original claim was continued in force, and made operative until there could be another forfeiture by reason of the failure of the owner to do the necessary annual work. The year in which the work was done began on the first of January, 1875, and ended on the 31st of December. The law fixes no time within a year when the

work must be done. Consequently, if done at any time during the year, it is enough, and there can be no forfeiture until the entire year has gone by. That, in this case, would not be until December 31, 1876, and the work, if completed on that day, would be just as effectual for the protection of the claim as if it had been done on the first of January previous.

It follows that on the 19th of December, 1876, the owners of the original location had, under the act of Congress, the exclusive right to the possession and enjoyment of the property in dispute.

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent: *Forbes v. Gracey*, 94 U. S. 762. There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States. The language of the act is that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals, separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States. In furtherance of this policy it was enacted (13 Stat. 441, chap. 64, sec. 9, Rev. Stat. sec. 910), that no possessory action between individuals in the courts of the United States for the recovery of mining titles, should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession.

Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocater seeks to avail himself of mineral in the public lands which another has discovered. This he can not do until the discoverer has in law abandoned his claim and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it

can only be exercised within the limits prescribed by the grant. Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done. It follows that the relocation of Belk was invalid at the time it was made, and continued to be so until January 1, 1877.

The next inquiry is, whether the attempted location in December became operative on the first of January, so as to give Belk the exclusive right to the possession and enjoyment of the claim after that. We think it did not. The right to the possession comes only from a valid location. Consequently, if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. As in this case, all these things were done when the law did not allow it, they are as if they had never been done. On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry. As the United States could not at the time give Belk the right to take possession of the property for the purpose of making his location, because there was an existing outstanding grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purposes of a valid location of a claim under the act of Congress. A location to be effectual must be good at the time it is made. When perfected it has the effect of a grant by the United States of the right of present and exclusive possession. As the proceeding to locate is one in which the United States is not directly an actor, but is carried on by the locator alone, so that he may take what the United States has, through an act of Congress, offered to give, it is clear

that there can be nothing to take until there is an offer to give. Here Congress has said in unmistakable language that what has been once located under the law shall not be relocated until the first location has expired, and it is difficult to see why, if Belk could make his relocation on the 19th of December, he might not on the 19th of January before: *Lansdale v. Daniels*, 100 U. S. 116. The original locators and their grantees had precisely the same rights after each date, the only difference being in duration. To hold that before the former location has expired an entry may be made and the several acts done necessary to perfect a relocation, will be to encourage unseemly contests about the possession of the public mineral-bearing lands which would almost necessarily be followed by breaches of the peace.

This brings us to the inquiry whether the possession of Belk, after the first of January, was such as to prevent the defendants from making a valid relocation and acquiring title under it. The position taken in behalf of Belk is, that even if the original locators, or their grantees, had, under the act of Congress, a right to the possession of their claim until January 1st, a statute of limitations in Montana would bar an action in their favor against him for its recovery, because they had not been in actual possession within a year previous to his entry, and consequently his entry, though tortious as to them, was good as the beginning of an adverse possession, which, if continued for a year, would entitle him to a patent under the provisions of section 2332 of the Revised Statutes. The statute of Montana relied on is as follows:

“No action to recover any mining claim, whether placer or quartz, or any quartz lead or lode, or any interest therein or possession thereof, unless the same be held under patent from the government of the United States, shall be commenced or maintained unless that it is proved that the plaintiff, or his assigns, or predecessor in interest, were in the actual seizin or possession of such mining claim, quartz lead or lode, within one year next before the commencement of such action:” Laws of Montana, 1872, p. 591.

And section 2332 of the Revised Statutes is as follows:

“Where such person or association, they and their grantors, have held and worked their claims for a period equal to

the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter in the absence of any adverse claim."

The Montana statute was passed January 11, 1872, and the act of Congress, under which both parties claim, on the 10th of May thereafter. Under the act of Congress, as has just been seen, the original locators, or their grantees, had what was equivalent to a grant by the United States of the right to the exclusive possession and enjoyment of the property until January 1st. The Montana statute, if in any respect repugnant to this, was repealed to the extent of such repugnancy by the act of Congress. As between possessors, having no other title than such as is derived from mere occupancy, an action would undoubtedly be barred by the Montana statute. Whether that would be so in a case where an actual right of possession had been acquired under the act of Congress is a question we need not consider, as here the controversy is not between Belk and the prior locators. It is clear that, whether an action could be maintained against him or not in Montana, Belk's right of location depended entirely on the act of Congress, and under that, as has already been seen, what he did had no effect to secure to him the grant of any rights. All he got or could get by his entry was possession, and that, to be of any avail, must be actual.

try was possession, and that, to be of any avail, must be actual.

Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough and kept all others out, his right to a patent would be complete. He had no grant to any right of possession. His ultimate right to a patent depended entirely on his keeping himself in and all others out, and if he was not actually in, he was in law out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding and deprived him of the title he might have got if he had kept in for the requisite length of time.

He had made no such location as prevented the lands from being in law vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. There is nothing in *Atherton v. Fowler*, 96 U. S. 513, to the contrary of this. In that case it was held a right of pre-emption could not be established by a *forcible* intrusion upon the possession of one who had already settled upon, improved, and inclosed the property. Upon that proposition the court was unanimous. We also all agreed that if a peaceable entry had been made on lands which had not been inclosed or improved, a good right might have been secured. The only difference of opinion we had was as to whether the entry in that case was by force or peaceably. A majority of the court thought it was forcible, while the minority considered that the case had been fairly put to the jury on the question of forcible or peaceable entry, and the effect of the verdict was that it had been peaceable.

This brings us to the facts of the present case. No one contends that the defendants effected their entry and secured their relocation by force.¹ They knew what Belk had done and what he was doing. He had no right to the possession, and was only on the land at intervals. There was no inclosure, and he had made no improvements. He apparently exercised no other acts of ownership, after January 1st, than every explorer of the mineral lands of the United States does when he goes on them and uses his pick to search for and examine lodes and veins. As his attempted relocation was invalid, his rights were no more than those of a simple explorer. In two months he had done, as he himself says, "no hard work on the claim," and he "probably put two days work on the ground." This was the extent of his possession. He was not an original discoverer, but he sought to avail himself of what others had found. Relying on what he had done in December, he did not do what was necessary to effect a valid relocation after January 1st. His possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough, as we think, to prevent an entry peaceably

¹ See similar case *Laird v. Waterford*, 50 Cal. 315, *Post* FORCIBLE ENTRY.

and in good faith for the purpose of securing a right under the act of Congress to the exclusive possession and enjoyment of the property. The defendants having got into possession and perfected a relocation, have secured the better right. When this suit was begun they had not only possession, but a right granted by the United States to continue their possession against all adverse claimants. The possession by Belk was that of a mere intruder, while that of the defendants was accompanied by color of title.

It is contended, however, that the court erred in its charge to the jury, because it assumed that the defendants' relocation was good if that of Belk was bad. The notice of the relocation of the defendants was proved by the introduction of the county records, and if we understand correctly the position which is now taken, it is that this notice was defective because of an insufficient affidavit. We can not find that this precise objection was taken below. When the record was first offered in evidence it seems to have been objected to generally, but afterward, on a motion to strike it out, the reasons assigned were: 1, that the original was not shown to have been out of the possession or under the control of the defendants; and, 2, that the record did not give a sufficient description of the location. As the affidavit to the notice of the relocation of Belk was identical in form with that of the defendants, it is possible such an objection as is now made was not then desirable; but however that may be, we are clearly of the opinion it can not be made for the first time in this court. The trial below was conducted entirely on the theory that Belk had the better right, because the defendants could not in law make a relocation at the time they did. The court had the right to understand that it was conceded the defendants had perfected their title if it could be done under the circumstances, and the special objections made to the evidence that was introduced should not be sustained. Nothing which occurred in the progress of the trial below can be assigned for error here which was not brought to the attention of the court and decided by it. When specific objections are made to the admission of evidence, the court has the right to assume that all others are waived, and proceed with the case accordingly. Consequently, when the

specific objections made to the introduction of this notice in evidence were overruled, the court had the right to consider it was no longer contended that the requisite notice had not been given and recorded.

This disposes of all the questions raised on the instructions to the jury. It remains to consider the various exceptions taken to the admission and rejection of testimony. These are—

1. As to the admission of the book from the office of the recorder of Deer Lodge county to prove the record of the location of the original lode claims by Humphrey and Allison.

2. As to the admission of the books of record from the same office to prove certain deeds by which it was claimed the title of Humphrey and Allison to the original lode claims was transmitted, in whole or in part, to one Murphy; and—

3. The rejection of the testimony of one McFarland, a witness produced at the trial.

1. As to the proof of the record of the location of the original lode claim.

As Belk sets up title only as a relocater of part of the original lode claim, he impliedly admits the validity of the prior location. There can be no relocation, unless there has been a prior valid location, or something equivalent, of the same property. It is nowhere disputed that Humphrey and Allison were the locators and owners of the claim originally. The proof by the record was, therefore, probably unnecessary; but if not, it seems to us the book offered was sufficiently authenticated. It was one of the books of record kept in the proper office and transmitted as such from one officer to another. The original recording appears to have been in a temporary book, and, at a very early date in the history of the county, transcribed by the deputy recorder, under the general supervision of his principal, into the book which has since been recognized as part of the public records of the office. It was sufficiently shown that the original book had been lost or destroyed. This we think is enough to justify the use of the present book in its place. Having been recognized as part of the official records of the county almost from the time of the organization of civil government in the Territory, it would be dangerous to exclude it now without any proof of fraud or mistake.

2. As to the deeds. In the view we take of the case, it is entirely unimportant whether the original lode claim had been transferred or not. The work was done in 1875, by Humphrey, one of the original locators, for the express purpose of resuming the claim. He says it was done under an arrangement which he made to that effect with Thornton, who, according to the deeds put in evidence, was the owner of three-fourths of the property, Humphrey himself owning the rest. It is a matter of no importance to Belk whether the work that was done inured to the benefit of Humphrey alone or to him with others. Without, therefore, considering any of the questions presented in the argument as to the competency of the evidence, or the proper execution of the deeds, we are clearly of the opinion that there is nothing in the assignments of error affecting this branch of the case which requires a reversal of the judgment.

3. As to the testimony of McFarland. He was in effect asked whether any one had that day pointed out to him the line between the National Mining and Exploring Company's ground and the defendants'; and, if so, who; and if he knew where the line was? There was but one question, and the objection was made to the question. It was entirely immaterial, so far as anything appears in the record, whether any one pointed out the line to the witness or not, unless it was some one connected with the suit or the parties. It is true, if he knew of his own knowledge where the line was he might tell, but in the form the question was put he could well think he would be permitted to tell where it was as it had been pointed out to him. The question was clearly too general, and on that account objectionable. It is quite possible the witness knew facts that were material to the issue which was being tried. If he did, and the plaintiff desired to have them, the question should have been made more specific, and the objections to the form of that which was put, removed.

Upon a careful consideration of the whole case we find no error.

Judgment affirmed.

¹BELK V. MEAGHER ET AL.

(3 Montana, 65. Supreme Court, 1878.)

Lost records, how proved. By an act of the legislature, all mining district records were required to be deposited in the office of the respective county recorders. Under this law the records of Summit Valley district were deposited in the office of the recorder of Deer Lodge county, who had them copied into a book of records. The original record of the location of a lode was subsequently lost. *Held*, that the copy was the best evidence, and of higher grade than the memory of witnesses.

Deed unacknowledged. Under the statutes of Montana, a deed is good if acknowledged, without proof of execution; or if not acknowledged but accompanied by proof of execution; and in either event when recorded, it imparts notice to the world.

Extent of the annual period. Under the act of Congress of May 10, 1872, the owner of a lode who has performed his annual labor for one year, has the whole of the following year in which to perform his annual labor for that year.

Title to mining lands. The locator of a mining claim has the exclusive right to the possession and enjoyment of the same, and he has a legal, as distinguished from an equitable title.

Relocation. The relocation of a mining claim before the same is forfeited by failure to do the annual labor is void, and a subsequent failure to do the annual labor by the original locators, will not revive the void location.

Appeal from the District Court of Deer Lodge County,
Second Judicial District.

J. F. FORBIS, A. E. MAYHEW, SHARP & NAPTON, and E.
W. TOOLE, for appellant.

W. W. DIXON and J. C. ROBINSON, for respondents.

The opinion states the case.

WADE, C. J.

In this action the plaintiff avers that he is the owner of and entitled to the possession of a certain quartz lode claim known

¹ Affirmed, *ante*, p. 510.

as the Anna Maria lode claim, situate in the Summit Valley mining district, Deer Lodge county, which claim of ownership is disputed by defendants, who, as the plaintiff alleges, are now wrongfully in the possession, claiming title, and in order to a proper solution of the questions of law arising in the case, a statement of facts becomes necessary.

It appears from the evidence that on the 19th day of December, 1876, the plaintiff located the ground in dispute, after having discovered a lead thereon, by posting notices of location and marking the boundaries thereof as the law requires, which notice of location was on the 21st day of December, 1876, filed for record in the recorder's office of Deer Lodge county. Subsequently to the location of the claim, the plaintiff worked thereon at different times, in all amounting to about two days' work, the last of which work was performed on or about the 15th day of February, 1877. It further appears that the defendants, Henry Meagher and Antoine Gagnon, on the 21st day of February, 1877, located the ground in question, after the discovery of a lead thereon, under the name of the Gagnon lode claim, by posting notices of location and marking the boundaries thereof, and have since their location worked and mined the claim.

The defendants, to defeat the title of the plaintiff, and to show that at the time he made his location and claim to the ground in dispute the same was not subject to location, but on the contrary that the possessory right and title to the same was held and owned by third persons, by virtue of a location long prior to that of the plaintiff, which right had been kept alive and in full force by proper representation and labor thereon, and therefore that the alleged right and title of the plaintiff was void—introduced in evidence and established the following facts, which appear from the testimony of William O. Humphrey, as follows:

“I am acquainted with the ground in dispute and with the old original lode; I know the ground Mr. Clarke now owns and also the ground of the National Mining and Exploring Company. Am acquainted with the ground lying between these claims. The ground here in dispute is what is known as the west one half of Discovery claim, claim No. 1, and part of claim No. 2, west from Discovery on original lode. These claims were

located by William Allison and myself; we located Discovery claim and claims Nos. 1 and 2 west. We staked and recorded these claims; the hole I sunk there is on west half of Discovery claim. I think we located claims in July or August, 1864. When I sunk Discovery hole I found a pretty good copper vein carrying silver; I found what I call wall-rock, and staked the ground. I think we put up a stake at each end of Discovery claim, and a stake at the end of every 200 feet claim after. We put up notice claiming Discovery claim, and claims 1 and 2 west. We recorded claims in district records on sheets of paper attached together in book form, and it was understood at the time that the district records were made on slips of paper, that they were to be copied into a book as soon as we got one. This (referring to a book of records taken from the county recorder's office) was the first book we got, and it was copied into this book which was the first book of county records, and these records were afterward copied into the county recorder's records. I was county recorder and turned records over to Judge Lewis, my successor. I would know district records if I could see them (records produced); I think that is the book; I think the handwriting in the book is that of Mr. Fisk; he was doing work for me. I believe this is the book in which district records were copied. I think this is the book I had when county recorder. Mr. Fisk was deputy recorder and did most of the work. I won't be positive that the original lode was recorded in this book; it may be that it was recorded in a smaller book used for district record, and then copied in this book. Mr. Allison was district recorder, I think, when original lode was recorded. These district records were kept until a county recorder was appointed. I was appointed county recorder by Governor Edgerton; I think I received my appointment about December, 1864. Part of the book is copied from district records. District records were delivered to me when I was appointed county recorder. All that was in old district records up to time of my appointment was copied into this book. We issued certificates of location from such records copied into this book. The signature in back of book purporting to be mine is not mine. I think same party that signed the rest signed my name. (Referring to page 30, witness said) I wrote

name of G. O. Humphrey on this page, but no other names that appear on this page. I can not say why I have written some and other parties have written rest. I think district records were copied just as they appeared on old records; I turned this book over to Judge Lewis, county recorder, who was my successor, in the winter of 1864-5 or spring of 1865. These books were recognized as the records of the district by the miners generally. I gave the book to Judge E. E. Lewis, county recorder, at Butte or Silver Bow; he moved his office from Butte to Silver Bow. The county seat was where the records were. I was appointed county recorder by Governor Edgerton, during session of legislature, I think about December, 1864. I think I entered upon the discharge of my duties about one month after my appointment. I did some recording in district records after I was county recorder, and made entries on record after my appointment. I can't fix date exactly when I delivered district records to Judge Lewis, county recorder. This book is partly copied from old district records. I don't know what became of old district records after they were copied; I do not know where they are; I think they are lost; I haven't them in my possession. The old records were partly on slips of paper fastened together and made into book form, and then copied into this book. I think these slips are lost. They came into my possession in 1864; I got them as soon as I went into office; I think papers are not in existence; I think Mr. Fisk copied records of original lode. He was deputy recorder; I can not say that I was present when he copied record or that I compared it; I think it is a true copy, but can not say positively; I can not say that I know it is a true copy; I think it is a true copy because Mr. Fisk copied it; I authorized him to make copy; if I had not thought Mr. Fisk would make correct copy, I would not have employed him. Mr. Fisk is somewhere in the Eastern States."

Henry S. Clark testified: "I am county recorder of Deer Lodge county. This is one of the books of record in my office. I found this book in the office when I took charge of the office. I have no slips of paper attached together in book form or otherwise purporting to be the records of Summit Valley mining district."

The book was then received in evidence as containing a record of the location of the original lode and claims thereon.

It further appears that on the 22d day of June, 1872, by deed of that date, William Allison and wife, conveyed to Joseph D. Binns, all their interest in the original lode, being an undivided one-half of the property described in the deed, except as to claim No. 2, west, which deed was signed and sealed by the grantors, but not witnessed, and the certificate of acknowledgment to the same was defective. On the 5th day of September, 1872, Binns, by his deed, conveyed to John C. C. Thornton, which deed was signed and sealed by the grantor, but not witnessed, and the certificate of acknowledgment to the same was also defective.

On the 31st day of May, 1872, G. O. Humphrey and others, by their deed of that date, conveyed their interest, being an undivided one-fourth interest in the property described in the deed, except as to claim No. 1, west, to John C. C. Thornton, which deed was properly signed and acknowledged, but the signatures thereto were not witnessed. The property described and conveyed in these deeds as parts of the original lode, is a part of the same ground and property claimed by the plaintiff and defendants in their respective locations. In the spring of 1875, Thornton caused the ground and lead in question, to be properly represented, and employed Humphrey and others to perform the necessary labor thereon for that purpose. On the 28th day of January, 1876, Thornton and wife conveyed to John T. Murphy, and neither Murphy nor Thornton represented the ground for 1876.

Upon these facts several questions arise. Was the book containing a record of the original lode, properly received in evidence?

Were the deeds from Allison and wife to Binns, from Binns to Thornton, and from Humphrey and others to Thornton, admissible in evidence? What interest does a person locating a mining claim upon the public mineral lands, in pursuance of the law and the local rules and regulations, acquire therein, and how is such interest kept alive so as to prevent a forfeiture and defeat a relocation?

1. As to the admissibility of the book of records, several facts in this connection are not controverted. The act of the

legislature of January 17, 1865, required all mining district records to be deposited in their respective county recorder's office, and when so deposited, that they become part and parcel of the county records. Probably under the operation of this statute the district records of the Summit Valley district, which have been kept on sheets of paper fastened together in book form, found their way into the recorder's office of Deer Lodge county, and became a part of the records thereof. This district record contains the original record of the original lode, and claims thereon. This record is lost. When it reached the office of the county recorder, that officer had it copied into a book of records, which has since been recognized by the miners of the Summit Valley district as the record of such district, and from which certificates of location of claims issued. There is no direct proof that this record is a copy of the original. This book of records containing a record of the original lode, was found in the office of, and among the records of the county recorder. This is *prima facie* proof that the record is genuine and correct. Mr. Fisk was deputy recorder and probably sworn to a faithful discharge of his duties. He copied the old district record into the county record introduced in evidence, and though the recorder could not say that he was present when this copy was made, or that he had compared it, yet he believed it to be correct, and it was so recognized.

Records when lost or destroyed may be proved either by copy or by the recollection of witnesses (1 Wharton on Evidence, § 135, and cases there cited), and the question we are to consider is whether or not the record, as introduced in evidence, was better evidence of the location of the original lode than the recollection of witnesses would have been? It was necessary to introduce the best evidence, and the original record being lost, and the testimony tending strongly to show that the copy preserved in the county records is correct, we think such evidence better and of higher grade than would have been the bare memory of witnesses. We are satisfied that the record received in evidence as proof of the location of the original lode was the best evidence that the nature of the case admitted of, and therefore that it was properly received.

2. As to the admissibility of the deeds. The deeds from

Allison and wife to Binns, and from Binns to Thornton were defectively acknowledged. We have held that the acknowledgment is no part of a deed, and that as between the parties thereto, a deed would be good without any acknowledgment (*Taylor v. Holter et al.*, 1 Mont. 688), and as against third persons who were seeking to locate the ground, if the grantees in such defective conveyances had represented the ground named therein according to law, and a forfeiture had thereby been prevented, such deeds and representations would defeat any relocation of the ground.

The original location being valid and the ground having been represented as the law requires so that no forfeiture has occurred, a defective conveyance would not create a forfeiture and subject the ground to relocation. Even if the Allison and Binns deeds were void, and the deed from Humphrey to Thornton, being for an undivided one-fourth interest in the property, was valid, such deed would preserve the rights of Thornton to represent the ground and prevent a forfeiture.

There were no witnesses to the deed from Humphrey to Thornton. Did this fact invalidate the deed under our statute? The statute provides (Codified Statutes, p. 396, § 3): "Every conveyance in writing, whereby any real estate is conveyed or may be affected, shall be acknowledged or proved and certified in the manner hereinafter provided." The statute then provides who may take the proof of acknowledgment; requires the officer taking the same to grant a certificate thereof, which shall be indorsed or annexed to such conveyance; what the certificate shall contain and the form thereof. And section ten is as follows: "The proof of the execution of any conveyance whereby any real estate is conveyed or affected shall be: *First*. By the testimony of a subscribing witness; or *Second*. When all the subscribing witnesses are dead or can not be had, by evidence of the handwriting of the party, and at least one of the subscribing witnesses." The statute then provides in substance, that no proof of a subscribing witness shall be taken unless such witness be personally known to the officer taking the proof to be the person whose name is subscribed to the conveyance as a witness thereto, or shall be proved to be such by the oath or affirmation of a credible person; that no certifi-

cate of such proof shall be granted unless such subscribing witness shall prove that the person whose name is subscribed thereto as a party is the person described in and who executed the same, and that such person executed the conveyance, and that such witness subscribed his name thereto as a witness thereof. The statute then provides what the certificate of such proof shall contain, and how the proof of the handwriting of the party, or of the subscribing witness, shall be taken. And section 18 is in the following words: "A certificate of the acknowledgment of any conveyance, *or the proof of the execution thereof*, as provided in this act, signed by the officer taking the same, and under the seal of the officer, shall entitle such conveyance, with the certificate or certificates as aforesaid, to be recorded in the office of the recorder of any county in this Territory."

The provisions of the statute when taken and construed together are not ambiguous or uncertain. It is evident that the object and purpose of the certificate of acknowledgment and also of proof of the execution of a deed, as the statute contemplates, is to authorize the deed to be recorded. In the absence of a certificate, and there being no proof of the execution of the deed, the same can not be recorded; but either a certificate of acknowledgment or proof of execution under the statute, so authenticates the deed as to qualify it for record. And so when there is proof of acknowledgment and a certificate thereof annexed or attached to the conveyance, no witnesses are required, and the conveyance is entitled to be recorded. And when there is no certificate of acknowledgment, but proof of the execution of the deed can be made by the subscribing witnesses thereto in the manner provided by the statute, then the conveyance is also entitled to record. The object of the record of a deed, and hence of the certificate of acknowledgment and proof of the execution thereof, is to impart notice to third persons. And hence it follows that neither the certificate of acknowledgment nor the attestation of subscribing witnesses are necessary to the validity of a deed, as between the parties thereto, and in no case where there is proof of acknowledgment and certificate thereof annexed or attached to a deed, and the same has been admitted to record by virtue of such certificate, are subscribing wit-

nesses necessary to the validity of such deed as to third persons.

Section 24 of the same statute provides as follows: "Every conveyance and instrument in writing, acknowledged or *proved* and *certified* and recorded in the manner prescribed in this act from the time of filing the same with the recorder for record, shall impart notice to all persons of the contents thereof, and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice."

And so it is obvious from the statute, when taken as a whole and construed together, that the object of a certificate or proof of execution is to entitle a deed to record, and that when by virtue of such certificate or proof a deed is entered of record, and recorded, it is good and imparts notice to third persons, in the absence of a certificate of acknowledgment, but accompanied with proof of execution, or in absence of proof of execution, but accompanied with a certificate of acknowledgment.

It follows, therefore, that the deed from Humphrey to Thornton which had no subscribing or attesting witnesses, but was properly acknowledged as the statute requires, and recorded, was good as between the parties thereto and as to third persons, and imparted notice to all the world.

3. This deed being good to all intents and purposes, and conveying to Thornton an interest in the property in question which he rightfully held and owned in the spring of 1875, when he caused the ground to be represented, it follows that he had the right to make such representation in order to protect and to save from forfeiture his interest in the property. Having made the representation in the spring of 1875, when, under the law, was it necessary for him again to represent the ground in order to prevent its relocation?

¹ Section 5 of the act of Congress of May 10, 1872, entitled "an act to promote the development of the mining resources of the United States," provides as follows: "On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than \$100 worth of labor shall be performed or improvements made, during each year. On all claims located prior to this act (which is applica-

¹ R. S., § 2324.

ble to the case we are considering) \$10 worth of labor shall be performed or improvements made each year for each 100 feet in length along the vein until a patent shall have been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim, and upon failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made. Provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after such failure and before such location."

Under this statute representation is the muniment of title. If representation fails the title is gone; if there is a forfeiture the claim becomes again subject to location unless, after the forfeiture, work is resumed before the rights of third parties intervene by relocation. On each claim located prior to the passage of this act, \$10 worth of work shall be performed or improvements made during each year for each 100 feet of such claim in order to prevent a relocation. The person making the location has one whole year in which to make the representation, and after having made one representation he has the whole of the next year in which to make the next representation. Having the whole year in which to make the representation, there can be no forfeiture until the full time has expired. If a claim is represented on the 30th day of December, 1877, such representation would save a forfeiture for that year, and would secure the party in his title until the 30th day of December, 1878, when the possibility of making representation for that year had expired. While the right of representation remains there can be no forfeiture, and so long as there is no forfeiture, the title of the person entitled to make representation is complete. The title only expires when the right to make representation is entirely gone.

Thornton having represented this ground in the spring of 1875, he or his grantee had the whole of the year 1876 in which to again represent it, and his rights thereto were not forfeited until the expiration of that year. It follows, therefore, that the location of the ground by plaintiff, on the 19th day of December, 1876, was made while yet the title of Thornton's grantee remained inviolate, and before there was any

forfeiture of his right, whereby the claim became subject to relocation.

4. Thornton and his grantee having failed to represent the ground during the year 1876, did any rights thereby attach to the plaintiff by virtue of his location on the 19th day of December, 1876? And this leads us to an inquiry as to the nature and extent of the title of Thornton's grantee upon the day of the plaintiff's location. What estate or interest does a person acquire by locating a mining claim according to law upon the public mineral lands, and holding possession thereof in pursuance of the law by properly representing the same from year to year?

The first section of the act of Congress of May 10, 1872, declares all valuable mineral deposits in lands belonging to the United States to be free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such, under the rules prescribed by law, and according to the local customs or rules of the miners not in conflict therewith. The act defines the extent or quantity of the public lands that one person may occupy and hold as a mining claim, and section 3 provides: "That the locators of all mining locations heretofore made or which shall hereafter be made on any mineral vein, lode or ledge, situate on the public domain, their heirs and assigns, where no adverse claim exists at the passage of this act, so long as they comply with the laws of the United States, and the State, Territorial and local regulations not in conflict with said laws of the United States governing their possessory title, shall have the exclusive right to possession and enjoyment of all surface ground included within the lines of their location, and of all veins, lodes and ledges throughout their entire depth, etc."

By the terms of this section the locator of a mining claim has a possessory title thereto, and the right to the exclusive possession and enjoyment thereof. These words imply property. The right to the exclusive possession and enjoyment of a mining claim includes the right to work it, to extract the mineral therefrom, to the exclusive property in such mineral, and the right to defend such possession. The right to the exclusive possession and enjoyment of property, accompanied with the right to acquire the absolute title thereto, presump-

poses a grant, and the instrument of this grant, as applied to mining claims upon the public lands, is the act of Congress above referred to. This act being of general application to all the mineral lands belonging to the government, and conferring a title or easement therein upon the locator thereof, and vesting the right in him to become the absolute owner to the exclusion of all others, is a legislative grant, and being given by act of Congress is equivalent to a patent from the United States to the same. The title thus conferred upon the locator of a mining claim is a legal title as distinguished from an equitable one, and such a title as would support an action in ejectment.

In construing a section of the act of Congress of July 26, 1866, which gave the right to the citizens to explore and occupy the mineral lands of the public domain, subject to the law and the local rules and regulations, this court, in the case of *Robertson v. Smith*, 1 Mont. 414, used the following language: "We hold that this section of the act grants to the proper person an easement upon such of the mineral lands belonging to the public domain of the United States as he may appropriate in accordance with the local rules and customs of miners in the mining district in which the same may be situated."

On page 416, same case, the following: "These rules and customs refer to the location, user and forfeiture of mining claims. When a miner locates a particular portion of mining lands in accordance with the rules and customs, then the grant from the general government to occupy, explore and take therefrom the precious metals, accrues to such miner over the ground located. The effect of this statute then is to grant these rights over the ground located in accordance with such rules, to as full an extent as if the land had been designated in the law."

If this were true under the act of 1866, the principle applies with stronger force to the act of 1872, which, in addition to giving the right to occupy and explore, gave also the right of exclusive possession and enjoyment to the locator, his heirs and assigns.

The Supreme Court of the United States, in the case of *Forbes v. Gracey*, 94 U. S. 767, speaking of mining claims

while held by possessory title and before a patent has been obtained, by MILLER, J., says: "These claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific coast States. They are property in the fullest sense of the word, and their ownership, transfer and use, are governed by a well-defined code or codes of law, and are recognized by the States and the Federal government. These claims may be sold, transferred, mortgaged and inherited without infringing the title of the United States."

This is the kind of property that Humphrey and Allison, by their location, and their grantees by purchase, became possessed of in the mining claim in question; property capable of being bought and sold, mortgaged or inherited, and property that the act of 1872 granted to the locators of mining claims and their grantees, clothing them with the exclusive possession and enjoyment thereof. The government by its grant had conferred this property upon the grantors of Murphy, who became the owner on the 28th day of January, 1876, while yet the grant was effectual and in full force by virtue of the representation of the ground by Thornton in the spring of 1875, which representation of the ground prevented any forfeiture thereof until the first day of January, 1877.

The government having made this grant to these parties there was no room for a like grant of the same property to the plaintiff. The location of Humphrey and Allison being still alive on the 19th day of December, 1876, the date of plaintiff's location, the property on that day was not subject to location by the plaintiff. His location therefore was void, and his right to claim a grant from the government, depending wholly upon the validity of his location, it follows, therefore, that he acquired no interest in or right to the property. And the fact that eleven days subsequent to plaintiff's location the ground became forfeited by reason of the failure of Thornton and Murphy to represent the same, would not revive a void location or confer any rights upon the plaintiff. There is no grant from the government, under the act of Congress, unless there is a location according to the law and the local rules and regulations. Such location is a condition precedent to the grant. Mere possession not based upon a valid location, would not prevent a valid location under the law. The

plaintiff resting his sole right to the possession of the property upon his location of December 19, 1876, and that location being void, for the reason that the ground was not subject to location, and for the further reason that the government at that time had no possessory title to grant therein, having bestowed the same upon the grantees of Humphrey and Allison, the demand of the plaintiff to be restored to the possession of the property must fail, and the possession of the defendants having been acquired by virtue of their location in 1877, after this title of Thornton and Murphy had become forfeited by their failure to represent the ground in 1876, must prevail. The title of Murphy was not extinguished until January, 1877, though his right of action may have been barred by the statute of limitation, but as it is not necessary in this case, we make no decision upon this point.

As to the testimony of McFarland in relation to the amount of work performed upon the claims in dispute, it does not appear that he knew the lines of the claim himself, or that the man who told him knew the lines, and there was no offer to prove that this person who informed McFarland knew the lines of the claims. Under such circumstances there was no error in rejecting the testimony of McFarland as to the amount of work upon the claims for the reason that the witness had no means of knowing whether the work he saw was or was not on the claims in dispute.

This view of the case renders it unnecessary for us to further pass upon the exception of plaintiff as to the testimony of McFarland on the question raised by the admission of testimony on behalf of the defendants as to the amount of labor performed by them on the claims after their location thereof.

Judgment affirmed with costs.

Judgment affirmed.

THE LITTLE GUNNELL GOLD MINING CO. v. KIMBER
ET AL.

(United States Circuit Court, District of Colorado, 1878.)

Claims located prior to 1872. On mining claims located prior to 1872, the owner was required to do at least \$10 worth of work on each one hundred feet before Jan. 1, 1875, or on that date the property became subject to relocation by a stranger, unless the owner was then in the actual possession of the claim, and had resumed work thereon.

Work by third parties—Resuming work before relocation. Work done by third parties, and purchased by the claimant after suit brought to recover possession, can not inure to the benefit of such claimant, but a failure to work the claim is not an absolute forfeiture; the original locator may resume work at any time before another has taken possession with intent to relocate; it is the entry of the new claimant, not the mere lapse of time, which determines the right of the original locator.

Relocation by drift from adjoining claim. A relocater must sink the original discovery shaft ten feet deeper, or make an entirely new opening by shaft, drift, adit or tunnel; it is not enough that he has run a drift into the claim from the bottom of a shaft on an adjoining claim.

L. C. ROCKWELL, for plaintiffs.

G. B. REED & WILLARD TELLER, for defendants.

Ejectment to recover possession of claims Nos. 6 and 7, west from Discovery claim on the Gunnell lode in Gilpin county. The claims were each 100 feet in length and were located at an early day, before any law was enacted by Congress, or by the Territorial Assembly, relating to such locations. Neither party had title from the government.

It was shown that plaintiff's grantors were in possession of the property and working it in the years 1862 and 1863, and there was some evidence of acts of ownership by plaintiff after it acquired title. It was not shown that any work was done by plaintiff on either of the claims, at any time, unless certain work done by L. P. Miller and others on the claim No. 7, in the year 1874, should be allowed in plaintiff's behalf. It appeared that the Miller party were working for their own account, and plaintiff purchased their right after the suit was brought. In the charge to the jury, it will be

seen that this was not accepted as a compliance with the act of Congress of 1872, (R. S., 2324) which, as amended, required that work should be done on each claim before Jan. 1, 1875. This work was not done by plaintiff, and defendants being lawfully possessed of certain other claims on the same lode in the month of January, 1875, entered on the property in dispute from those claims. The shaft through which defendants worked their own property, was 279½ feet east of the property in dispute. At a depth of 500 feet this shaft communicated with a level which extended west to the property in controversy, and was by defendants driven through that property in the month of January, 1875. Defendants contended that this work was such as was required, by sec. 16 of the act of 1874 (10 Sess. 189), relating to abandoned claims, but the court was not of that opinion. Defendants proved that they caused the property to be surveyed, and set up boundary stakes as required by the act of Congress of 1872, and the act of the Territory of 1874, but nothing was shown respecting the location stake mentioned in the 16th section of the Territorial act. Defendants offered to read in evidence a certificate of location, which, upon objection, was excluded, on the ground that defendants had not complied with the act respecting the manner of taking and locating abandoned claims, and that the course of the lode and the number of feet claimed was not therein specified as required by the act of 1874. Plaintiff also gave evidence to show that in the month of February, 1875, it caused work to be done on the surface of the claims of the value of \$20 and upwards. It also appeared that defendants were then and ever since in possession of the property. The suit was brought in 1875, soon after the work was done by plaintiff.

Defendants contended that they had complied with the acts of Congress respecting the location of these claims, and that nothing more could be required of them. They asked the court to charge that the Territorial act of 1874 was not at all applicable to the case. They also contended that plaintiffs, having failed to work the claims prior to January 1, 1875, and defendants having entered on the same for the purpose of relocating them, plaintiff could not lawfully enter for the purpose of doing work, or for any other purpose, while de-

fendants were in actual possession. But the court was of a different opinion, and he charged the jury as follows:

HALLETT, J. This is an action of ejectment to recover the possession of claims Nos. 6 and 7, west from Discovery, in the Gunnell lode.

Evidence has been introduced to prove that certain parties were in possession of one of the claims, and certain other parties were in possession of the other claim at different times since 1860, and that these parties conveyed to others who conveyed to plaintiff.

I have not examined the conveyances which were put in evidence before you to see if they formed a perfect chain of title. That matter is for your consideration and you will determine it on the evidence.

If persons were in possession, working the claims, and they conveyed to others, who afterward conveyed to plaintiff, so that plaintiff acquired whatever right such persons had, then, as the evidence stands in this case, the plaintiff is entitled to recover.

Under the act of Congress of 1872, claimants of mines located before the passage of that act were required to do work of the value of \$10 annually for each 100 feet of the claims held by them. This act was twice amended extending the time within which the first work could be done until Jan. 1, 1875.

As these mines were located earlier than 1872, plaintiff claiming to be the owner of them was required to do work on them, of the value of twenty dollars, at least, before Jan. 1, 1875.

It is not pretended that the plaintiff did such work before Jan. 1, 1875, and the failure in that respect was such an abandonment of the claims, as authorized any one to go on the property and relocate it. In respect to that matter defendant's counsel have asked me to say, and it is quite correct to say, that if you find from the evidence that no work was done by the plaintiff on the property in controversy during the year 1874, then that such property on the 1st day of January, A. D. 1875, was abandoned and forfeited, and subject to occupation and relocation on said 1st day of January, 1875, and that any person, a citizen of the United States, over the age of

21 years, had a legal right to enter into and occupy the same, on the said 1st day of January, A. D. 1875, unless the plaintiff was at that time in the possession and occupancy of the property, and had resumed work thereon.

And so also it should be said that the work done under the statute must have been done by the plaintiff acting through its agents, and not by another whose right was purchased by plaintiff. On that point I give the instruction of defendants as asked, which is as follows:

The court instructs the jury that any work done upon the property in controversy during the year 1874, by Miller, Lynn and Gray, on their own account, and not at the instance of plaintiff, can not inure to the benefit of plaintiff by virtue of any payment for or pretended purchase of such labor made by plaintiff after the commencement of this action.

The failure to work the claims was not an absolute forfeiture of plaintiff's right to the property, if it had such right, prior to January 1, 1875, because the statute provides that an original locator or claimant may resume work at any time after failure to perform the work and before the claim has been relocated.

Although this work may not have been done within the time fixed by law, the original locator or claimant may resume work and thus regain his first estate, at any time before another has taken possession of the property with intent to relocate it.

It is the entry of a new claimant, with intent to relocate the property, and not mere lapse of time, that determines the right of the original claimant; and the new claimant must proceed with diligence under the statute in order to hold the property. Sixty days is allowed by law for sinking the original discovery shaft ten feet deep, or making a new opening to the crevice of some kind.

If there is a discovery shaft on the claim, he may go into that and sink it ten feet deeper; but where, as in this case, there is no such shaft on the claim, he must make a new opening to the crevice ten feet or more in depth.

He may run a tunnel, an adit, a level, a drift, or any other kind of opening, provided it is a new one.

That is the proper construction of the 16th section of the

act of the legislature of 1874, which plainly declares that in relocating a claim the original discovery shaft shall be sunk ten feet deeper, or a new shaft shall be sunk.

In the case now submitted to you, the defendants went into a shaft on adjoining property and run a drift in the direction of the property in controversy prior to January 1, 1875.

Perhaps they arrived at or near the claims in dispute about January 1, 1875, and went on with their drift through those claims during that month. This we hold is not sufficient to make a valid location under section 16 of the act of 1874. That act, as before stated, requires a new opening or shaft, when the old discovery shaft is not used and this work was not of that character. Defendants had a right to perfect their location at any time within the ninety days given them by statute, and probably at any time before plaintiff should re-enter the property with intent to resume work, but they must have done everything required by the statute, such as posting notice, fixing boundaries, sinking shaft or opening to the crevice, and everything necessary in order to be secure against plaintiff's re-entry.

Unless they did so, plaintiff had the right to re-enter, and upon doing the annual work required by law, it would become re-invested with its first estate.

The entry of defendants on January 1, 1875, was legal and proper, but if they failed to perfect their location within ninety days, by sinking a shaft, erecting a location stake at such shaft, and recording the claim, as the statute requires, as against the plaintiff, their possession was wrongful from the time of entry.

They have not been able to show that they complied with the law in respect to relocating the claims, and if plaintiff had good title prior to January 1, 1875, as before explained to you, and resumed work on the claims soon thereafter, and did work of the value of twenty dollars or more, you should find for the plaintiff.

But you must believe from the evidence that the plaintiff did do such work, and that it had such title in order to return a verdict of that kind.

The jury returned a verdict for the plaintiff, on which judgment was entered.

SLAVONIAN MINING CO. V. PERASICH ET AL.

(7 Federal Reports, 331. U. S. Circuit Court, Nevada, 1881.)

Amendment to § 2324, Rev. Stat. construed. The act of Congress of Jan. 22, 1880, amending § 2324, Rev. Stat., did not act retrospectively, and its first application to claims located since May 10, 1872, would be Jan. 1, 1881.

Relocation. A location made upon a mining claim before the owner has failed to do the annual labor is a mere nullity, and his continued failure so to do will not make such a location valid. The claim is not subject to relocation until the owner is in default.

Threats to prevent resumption of work. Threats made at a distance from a mine, to prevent the owner from doing the annual labor, will not excuse a failure on his part to resume work; there must be an effort to do the work, or the claim will become open to relocation.

Possession after forfeiture. The original locator will not be justified in making a forcible entry on mining ground, after forfeiture incurred, while it is in the possession of one who has entered, seeking to relocate it for the forfeiture.

GEORGE E. HARPHAM, for plaintiff.

WALTER H. TOMPKINS and A. C. ELLIS, for defendants.

HILLYER, D. J.

This is ejectment for a mining claim in Columbus mining district, Nevada. A jury has been waived by written stipulation. It is submitted to the court mainly upon an agreed statement of facts; the only disputed facts being in regard to plaintiff's excuse for not doing work in 1880, after the claim was forfeited under the mining laws of the United States. It is agreed that no work was in fact done on the claim by the plaintiff, after October, 1878. The claim was originally located January 3, 1876. January 22, 1880, Congress amended the mining law by adding the following words to section 2324, Rev. St.:

"Provided, that the period within which the work required to be done annually on all unpatented mineral claims, shall commence on the first day of January succeeding the date of location of such claim; and this section shall apply to all claims located since the tenth day of May, A. D. 1872."

It was faintly argued that this proviso gave the plaintiff the whole of the year 1880 in which to do work, although none had been done in 1879. The object of this proviso was to make a uniform period for the annual work on all claims located since May 10, 1872, and fixed the first of January next succeeding the date of location as the time of its commencement. A claim located as this was, January 3, 1876, would not require any labor to be done on it, under this proviso, before December 31, 1877. Before the proviso, work had to be done by January 2, 1877. But in this case no question is made as to the work being done up to January 3, 1880. The last work done in October, 1878, held the claim until January 3, 1879. As the law then stood work was required before January 3, 1880, and not having been done, the claim was forfeited unless work were resumed as the law provided. The law of January 22, 1880, did not, in my judgment, act retrospectively, and its first application to the plaintiff's claim, would have been January 1, 1881. Claims located prior to May 10, 1872, had already been provided for by extending the time for the annual expenditure thereon to January 1, 1875: 18 St. 61. By applying the law of January 22, 1880, to all claims located since May 10, 1872, all cases were provided for, and a rule for all annual expenditures established, uniform with the calendar year. This is the view of the general land office, and is undoubtedly correct: Sickles' Mining Laws and Decisions, 1881, pp. 392, 393. Thus there was no forfeiture of the plaintiff's claim, until January 3, 1880.

In September, 1879, the defendant, Samuel Vacovich, relocated this claim. This, it is admitted, was a premature location, but it is claimed by the defendants to have been validated after January 3, 1880, by the failure to do the annual work on the part of plaintiff. But this, in my judgment, is a wrong view. Vacovich, before January 3, 1880, was a trespasser, and could not lay the foundation of any valid claim to this mine before that date. Until then the plaintiff was not in default, and its ground was not subject to relocation, for the failure to do the annual work.

It would never do to permit an entry upon a mining claim before the owner of it was in default, for the purpose of making a provisional location, to be valid or worthless according as

the owner failed or not to do the annual work subsequently. The Vacovich location was a mere nullity. On March 19, 1880, Mr. Koenecke, president of the plaintiff, by authority of the company, went to Candalaria to do the annual work, and it is admitted that at this time the claim was forfeited and subject to relocation, and that unless what was done by Mr. Koenecke in March, and by Mr. Harpham in June following, amounted to a resumption of work on the claim, there can be no recovery. The provision of section 2324, Rev. St., is that—

“The claim or mine upon which such failure (to work) occurred, shall be open to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure, and before such location.”

Mr. Koenecke testifies: That he visited the mine March 19, 1880, and that it is situated about a mile from the town of Candalaria. About half way between the mine and Candalaria he met Thomas Perasich, one of the defendants, and told him he was going to do the annual work on the mine; that Perasich there told him that he was the sole owner of the mine and could not permit any one to work on it; that he would shoot any one who attempted to work; and that he did not do any work on the mine because he was threatened with shooting. It does not appear that Perasich did, in fact, offer any violence, or that he prevented Mr. Koenecke from going on to the mine. Mr. Koenecke states further that he did go on to the mine, and finding a padlock on the door of the tunnel, abandoned the idea of work.

Mr. Harpham testified: He was sent down by the board of directors in June, 1880, as agent and attorney at law; that before going to Candalaria he stopped in Carson and commenced this suit, taking the summons along, to be served in case he was not allowed to do the annual work on the mine for the year; that on his arrival at Candalaria he made inquiries touching the locality of the mine, and went out to it or in its vicinity. He says, on cross-examination, he does not know whether he was on the claim or within a quarter of a mile of it, but saw the mouth of the tunnel closed up. He further

testifies, that without attempting to do any work, although in no way molested, he next sought the defendants, and sought permission of Thomas Perasich to work before trying to do any; that he found Thomas Perasich at the Tilden mine, some ten or twelve miles from Candalaria, and at that distance from the mine told him he had come down to do the annual work for the year; that Perasich there told him that the mine was his, and he was in possession and would blow the top of anybody's head off who tried to do work on the claim for plaintiff; that the deputy marshal was with him, and upon this he had him serve the summons. He also testifies that from what he heard about Candalaria he did not think it would be safe to try to work.

This is a favorable statement of the evidence for the plaintiff. Both Perasich and Gregovich deny that any threats were made, and Perasich denies that there was any padlock on the tunnel door. There is also some conflict as to what occurred at the Tilden mine. Perasich denies that he said he was in possession, and denies that he was in fact in possession at the time this suit was commenced. But let us assume that the statements of Mr. Koenecke and Mr. Harpham are absolutely correct, and it does not follow that what they did amounts to a resumption of work as the law requires. Neither states that there was any offer of violence even at that distance from the mine. No weapon of any kind was shown, and there was no demonstration by any act, so far as testimony shows, calculated to alarm, beyond these naked threats, made in one instance a half a mile and in the other seven to twelve miles from the ground in controversy. Moreover, it appears by the testimony of both, that they went to the mine during their stay at Candalaria and were altogether unmolested. Why no attempt was made to work at these times does not appear. Words, unaccompanied by any overt act showing a present intention of carrying them into effect, even on the ground, would hardly justify the plaintiff in declining to make some effort to work. But unless the threats were made on the ground, or so near as to amount to the same thing, they certainly ought not to have that effect. The threats made to Mr. Koenecke by one of the defendants, a half a mile from the mine, do not seem to have had a very serious effect on Mr. Koenecke, or the other di-

rectors, for they still thought in June that the work might be done.

Mr. Harpham says he was to try to do the work, and only serve the papers in case he was not allowed to do it, and that he had a considerable sum of money with him—\$100, or so—with which to carry out that purpose. Harpham was not in any way molested when he visited the mine. He made no attempt to work, but sought Perasich at the Tilden mine, seven to twelve miles away, to obtain his permission. I have no doubt that at this time if Harpham, instead of seeking for Perasich, had made a real effort to perform the labor which the law requires, he would have succeeded. But whether he would or not, it certainly seems to me to have been his duty to try. Yet, although not molested by any one, he is not sure that he got on to the claim while he was in Candalaria. At this time the plaintiff might have resumed work, and complied with the law if it were done peaceably. It had no need to ask permission of any one. Either its old claim was good or it had none. It might enter by virtue of its old location so long as the ground remained unappropriated. Whenever there has been such force as excuses from performance, it has been on the ground. I have not been referred by counsel to any authorities on this point.

In *Robinson v. Imperial*, 5 Nev. 44, De Groat, while engaged in fencing his land, under a law which required him to fence within one year, was forcibly stopped by Black and Eastman, and himself and employes driven from the premises. And in *Alford v. Dewin*, 1 Nev. 207-14, the defendants had entered, and the plaintiffs being wrongfully ousted, could not fence. I will not say that there may not be threats on the ground, unaccompanied by acts, of so serious and menacing a character as to satisfy a man of ordinary prudence it would be unsafe to begin work, and in such case it might be an excuse for non-performance. But that is not this case. Had Harpham, instead of visiting Perasich at the Tilden mine, gone to plaintiff's mine and begun work, at the worst, he would have had to leave when ordered off. There is not the least probability that he would have been injured in his person if he had been willing to do this without resistance. I have no doubt from the testimony, that had Harpham at this time com-

menced work on the claim resolutely, the defendants would never have interfered with him. At all events, I find that his fears of personal violence had no sufficient foundation, and did not justify him in declining to make an effort. It follows that the claim was open to relocation on the 27th day of September, 1880, when according to the agreed statement of facts, it was relocated by the defendant, Thomas Perasich.

Another view of this case is this: The complaint alleges an ouster on the twenty-fifth day of November, 1879, by the defendants. Now, it would have been sufficient to have shown such an ouster, and if continued, as alleged, to the time of bringing this suit, it would have been unnecessary to show that work had been performed by the plaintiff so long as the defendants withheld possession; because, in November, 1879, there had been no forfeiture. The plaintiff, then, should have stood upon proof of these facts, if they could have been established. But I presume that it had no sufficient proof of them, for it was distinctly admitted, as has been before stated, that unless work was done after January 3, 1879, or such an attempt to work as amounted to the same thing, the claim had been forfeited. The ouster, admitting one to have been proved, was in June; the proof consisting of an alleged statement by Thomas Perasich, seven miles from the claim, that he was in possession. But the plaintiff sought to establish a possession in defendants, and claims that it did so.

It was obliged to show possession in the defendants at the time of bringing this suit, or fail in it. Upon its own theory, that the defendants were in possession, claiming the ground, I do not see how it can justify an entry upon the possession of another, who, by the terms of the law, has the same right to relocate the claim that the plaintiff or its grantors had to locate it originally. The language of the law is that after a failure to work, (and it is conceded there was a failure in this case), the claim shall be "open to relocation in the same manner as if no location of the same had ever been made," with a proviso that the original locators have not resumed work after failure and before such location. Did Congress contemplate anything besides a peaceable entry and resumption of work before an entry by the relocators? I think not. Congress never could have meant to enact a law which would encourage

breaches of the peace, as this would, if the original locators might resume work at any time before a formal relocation by those who had entered after forfeiture for the purpose of relocation.

The relocater, after entry for the purpose of locating, would be in the same predicament as the original locator was when he took possession in the first instance, and would have precisely the same rights—the same right to hold the ground against trespassers, upon the basis of his *possessio pedis*, without complying with the local rules and customs, or indeed with the law of Congress: *Atherton v. Fowler*, 96 U. S. 513. So that, after a forfeiture incurred, the original locator, it seems to me, can not put himself in a position to maintain ejectment, except by actually resuming work before an entry by a person seeking to relocate for the forfeiture, and an ouster by such person; for clearly the defendants in this case, finding no one on the ground, had a right to take possession after January 3, 1880. After that date, and before resuming work, there could be no ouster of the plaintiff. Nor would the plaintiff after forfeiture incurred, be justified in making an entry on this mining ground while in the possession of another. The threats of Perasich were, therefore, upon the theory of plaintiff that he was in possession, nothing wrong, if this view is right.

Let judgment be entered for defendants for costs.

Work done outside the claim or on contiguous claims: *Mt. Diablo Co. v. Callison*, 5 Saw. 439; *Post* LODE.

The entire year allowed to complete labor: *Atkins v. Hendree*, 1 Ida. 107; *Post* CLAIM.

THE IRON SILVER MINING COMPANY v. MURPHY ET AL.
IRON MINE v. LOELLA MINE.

(2 McCrary, 121. 1 Colo. L. R. 16; 3 Fed. R. 368. Circuit Court of the U. S., District of Colorado, 1880.)

Locator may follow dip of lode. If a location is made upon the top or apex of a vein the law gives the miner the whole of the vein, wherever it may go; he may follow it to any depth, although in its downward course it may enter the land adjoining.

Top or apex defined. The top or apex is the end or edge or terminal point of the lode nearest the surface of the earth. It is not required that it shall be on or near or within any given distance of the surface. If found at any depth, and the locator can define on the surface the area which will inclose it, the lode may be held by such location.

Part of lode detached becomes a distinct lode. If one part of a lode be detached from another by a movement of the country after the lode was deposited, that circumstance will give it individuality, and if it carries ore it may be taken and held as a distinct lode.

Location other than at top. No location can be made on the middle part of a lode, or otherwise than at the top and apex, which will enable the locator to go beyond his line.

Location void beyond where apex leaves side lines—Description in verdict. A lode location is valid only to the extent to which the top or apex is included within the claim; and where it is not included the entire length of the claim, the jury (in finding for the plaintiff on such a location) should designate in their verdict, the extent of the lode to which the plaintiff is entitled.

HALLER, D. J., (charging jury).

I regret that it becomes necessary to ask you to consider a case as important as this, at a late hour on Saturday evening, and after a week of such labor as you have endured. If we were not a busy people in this country, we might, by going on for three or four hours each day, make it much more comfortable all around, and I sometimes think that, perhaps, we would come to better conclusions if we could take a little more time for it, but you know how it is with us—we have to hurry along; everybody who comes here, jurors and witnesses, seem to feel that within the next thirty days there is something of great importance to them to happen to which they

must give their personal attention; and so we try to move in court according to the manner of doing business in the country in which we reside, as rapidly as possible. If you could go over from now until morning, if to-morrow were not the Sabbath day and the next day after that a holiday, I would be inclined to put off the further consideration of this case until to-morrow, or the next day, but it seems to be necessary, in order that there may not be too much delay, that you should do what best you can. The question for your consideration—and I do not think there is more than one of very great importance—is exceedingly important to these parties. Whether it may be of importance to other parties, not parties to this controversy, is not a matter for your consideration, or for mine. The decision in a cause in this court may be of some value as a precedent. Courts usually try to find out the correct principle upon which a cause should be decided, and when once, after some attention to the subject, they have arrived at a conclusion as to the rule which shall be observed in any cause, it is regarded as a decision which may be followed in subsequent actions of the same character. But the case has no other importance than as it affects the property in controversy, for there is nothing here but the interests which are involved in this suit; and this is peculiarly so as to these mining cases.

In all of my experience, and it has been of some length in this country, I do not know that I have found two cases which exactly resemble each other; almost always, the case arising has some peculiarity that will distinguish it from another; some feature which we have not observed before, and which varies a little the rule which is to be applied. Of course there are certain principles recognized always and in all cases, which no one will controvert, of which this can not be said; but there are peculiarities in each case, and it may be said that each stands upon its own bottom. So that you ought not to have any impression from what has been said by counsel, that your decision is of any importance as affecting the mining interests of Leadville or any other section of the country. It does, in fact, only affect the matters here in issue between these parties and this property.

Now as to the amount involved, it is true it is considered by

the parties as considerable, but in law we should decide it the same as though it were of the most trifling character; the rule is that the same principle must be applied in all cases to the rich and poor alike, and it is your duty and mine to discard all reference in regard to the amount and to the parties, treating them as we used to in school the algebraic quantities, the representatives of value which were arrayed against each other, and which we used in working out the problems there submitted to us. It matters not whether a man on one side of this controversy is rich and the other poor; it is not a matter which should affect our judgment in one way or another.

As to the matters which are particularly for your consideration, you have observed in all that has been said by the witnesses and the counsel, that it is a controversy relating to the lode and the vein at a point somewhat distant from the location. That is to say, according to the custom of miners, the plaintiffs, or their grantors, secured a location 300 feet in width and 1,500 feet in length at a certain point. In that ground, originating there by its top and apex, they say they have the top and apex of the lode, and having given proof, which I think is uncontradicted, to the effect that there is a lode there, in pursuit of that lode beyond the lines of their location, and at a distance of four or five hundred feet east of their location, they have reached a point where they have come in conflict with the defendants. This location was made upon the surface or the declining surface of the hill—I do not know that any of the witnesses have stated to you the exact contour of that hill, how much it declines, but it is shown that it is a hill declining to the westward; that is, coming down from the east and declining to the westward, and they made their location on the side of that hill. The defendants went to the east of that location some four or five hundred feet—I do not know that we are told the exact distance, nor is it important; but they went upon the surface of the hill above the plaintiffs ground at a considerable distance and there sank down a shaft to a depth of three hundred feet—something like that—and have run down to the vein into the plaintiffs' incline, and the plaintiffs say they have the top, or apex in their ground. Now it is a part of the statute law of the United States, that these locations shall be upon the top and apex of the vein. The law

goes upon the hypothesis that all veins are more or less vertical in the earth. They come up something in this manner : If we suppose this sheet of paper represents the vein, that they extend in some position vertically, or somewhat so, to the surface of the earth, and that the end or top of the vein comes up toward or near the surface, and the miner in searching for it will make his location with reference to the end or top which comes up toward the surface; and the plaintiffs say that they did make their location according to the top and apex; that they found it in a certain locality, and inclosed it in their parallelogram; laid out their ground with reference to the top and apex.

Now the law—that being done—gives the miner the whole vein wherever it may go. The law permits him to follow it to any depth, *to any depth*, although in its downward course it may enter the land adjoining. He may go down on the course of the vein as far as he can pursue it; as far as he can show that it is the same lode or vein he may follow it, however deep it may go, until it becomes, in the nature of things, an impossibility to go any further. You know that at some depths it is impossible to go, because it becomes so warm, or other difficulties are encountered which render it impossible to go further. Now the plaintiffs claim that in pursuit of the lode away out to the east of their location, the defendants came down upon them and ousted them from the possession, and if that is true, the plaintiffs are entitled to recover, because if the vein originating in their own ground, proceeds distinctly and clearly out to the place in controversy, the plaintiffs are entitled to it there, as well as in their own surface lines.

Now, as to whether it does proceed in that manner, I think the evidence is quite clear, and you will have no difficulty about that. From this point in these first workings of the plaintiffs, as shown on the map, and as has been illustrated upon all the maps which have been put up, from that point the vein extends away down to the Murphy shaft. A large part of the testimony has been directed to that point, and the witnesses have all concurred in saying that the vein extends right along, from one point to the other. We used to have some controversy as to whether it could be pursued in that

manner, if it declined by only a small degree, only a little from the plane of the horizon. The witnesses stated that it was twelve or fifteen degrees below the plane of the horizon, and it used to be contended here in this court, and in other courts of the State that they could not hold the vein if it declined in only a small degree from the plane of the horizon; they said that the law should be applied to veins which are more vertical in their course, but we have heard nothing of that in this case. That point was decided against that view whenever it was made, and we have heard nothing of it in this case; it is not a question in issue, for it has not been raised either by the instructions submitted to me, or requests to charge, or arguments of counsel. And then there is some question here as to the extent of the top or apex of the location—assuming that what they claim to be the top and apex is such—there is some question here as to the extent of it along the course of the location from north to south. You will remember the evidence about that drift that runs away off across the map down to the left, down to the northwest—I have sometimes to stop to get these directions myself, although I ought to be very familiar with them—down to the northwest, and which may tend to prove that out in that direction, the top or apex of the lode, if there is any, may be down lower below this claim and upon the Iron Hat, or somewhere down there. If that were a question in issue here we should have some difficulty about it, but it is not. As to this particular ground that is in controversy, between the plaintiffs and defendants it is agreed that if there is any top and apex whatever, it is there along where the witnesses have explored the ground, and which they mentioned in their testimony, from along in those first workings to the north of the main incline, and not very far to the north of it. So that the single question which appears to be for your consideration relates to this top or apex, and whether there is any such thing there or not. Upon that point, fearing that I might talk a little at random, as I sometimes do, I have written down what I wish you to consider with reference to it.

The principal question for your consideration is whether the plaintiff has the top and apex of the lode in its location or within the lines of its location extended downward vertic-

ally. As presented by the evidence the question is, whether the top and apex of the lode is anywhere exposed, or does in fact lie in plaintiff's ground.

And first we may say, by way of definition, that the top or apex is the end, or edge, or terminal point of the lode nearest the surface of the earth. It is not required that it shall be on or near or within any given distance of the surface. If found at any depth, and the locator can define on the surface the area which will inclose it, the lode may be held by such location. Now whether there is such an end, edge or terminal point of the vein or lode at any depth in plaintiff's ground, is the question to be determined by the evidence. To establish that proposition the plaintiff has given much evidence tending to prove that the ore body terminates at or near the first level north, or the water level spoken of by the witnesses. And that if any ore or vein matter may be found westward from that line its presence in that locality may be accounted for on the hypothesis that it was brought into that position subsequently to the deposition of the vein and by some disruption and upheaval of the country.

You will readily recall what was said by the witnesses for the plaintiff as to the deposition of the lode matter between the porphyry and lime, while the latter were in some other and probably lower position, and by subsequent upheaval or depression the whole mass was broken into fragments of which ore is found at the Iron claim. In such movement it is said that a new fissure was formed on the face of the fractured limestone into which much of the vein matter would necessarily fall, and thus may be explained the presence of any ore or gangue that may have been found on the western face of the limestone. It is not my purpose to go over the evidence on that point or even to mention the principal points in it. That has been done by the counsel, and you are to consider all that has been brought before you on the subject. But I draw your attention to that theory, and say to you that if the vein, or lode, was formed in the way supposed, in connection with a much larger extent of the same matter, and this part, detached from another, was brought into its present position by some movement of the country, occurring after the lode was deposited, that circumstance will give

it unity and individuality as distinguishing it from every part to the west of it. And if that theory be correct, the occurrence of ore or gangue on the western face of the limestone is not material, for the uplifted part lying on the upper face or plane of the limestone to the eastward having been detached from the mass of which it was originally a part, gains by that circumstance a new end or terminal point by which it may be held. In that view the fissure, if any, on the western face of the limestone, occurring after the other in point of time, has a distinct character of its own, and if it carries ore may be taken and held as a distinct lode.

You understand, gentlemen, that it may be separated from the other, originating at a different time, and thus having a different character, although it connects, at the points mentioned by witnesses, with the other fissure; it may be regarded as a distinct body in itself, which may be taken as such, if it has anything in it of value.

In that view, if you find that it is sustained by the evidence, the plaintiffs have the top and apex of the lode in their location, and I do not discover any other point which should give you difficulty in arriving at a verdict for the plaintiffs. And generally in support of that view, it should be borne in mind that a fissure on the western face of the limestone descending with the slope of the hill, would seem from its position, and may appear from the evidence to have but little value. And if by taking it in connection with another fissure standing at right angles with it, or nearly, the latter containing valuable ore, we may defeat a location made at the angle formed by both, the evidence should be clear to the point that they are one in origin and growth. In other words, the plaintiff's grantors, having located on a valuable part of the lode, if what lies west of them, is very clearly to your minds barren and worthless, before it shall be accepted to defeat plaintiff's location in any of the elements which attach to a proper location, the evidence should clearly establish the connection and unity of the several parts.

We come next to the position assumed by the defendants to the effect that the lode is continuous from side to side of plaintiff's location, and that the part which plaintiffs claim to be a top or apex is only an upward swell, ridge, or high point

in the vein from which it descends in both directions. In support of that view evidence has been given to the effect that the ore was deposited after the tracts had come to their present position, the deposition proceeding practically at the same time and by the same agencies on the upper and eastern face of the limestone, and upon the western face of the limestone as well.

You understand, gentlemen, that there is a difference between these parties as to the time of the upheaval or break; that is, as to whether that occurred before or after the deposition of the mineral.

According to that theory the ore was deposited as it is now found on the eastern and western slopes of the limestone by the same forces and in the same way and at about the same time. I do not go over the evidence in relation to that matter, or mention the principal points in it, but leave you to consider it in connection with that given by the plaintiff touching the origin of this lode. All of this evidence is valuable only as it may enable you to determine whether the lode is continuous from one side to the other of plaintiff's location.

And if it is continuous as suggested, that is to say, if coming in at one side it passes unbroken to the other, the plaintiff can not follow it beyond the lines of its location. And here you must remember all that has been said concerning the matter of the continuance of the fissure or cavity in which the ore is found. For the ore may be continuous apparently with a difference in origin of the fissure as to the several parts thereof. But if, the fissure existing on both faces of the limestone at the time the ore was deposited, the latter was deposited as before explained at one and the same time and by the same forces, it ought to be said that it is continuous throughout. And no location can be made on the middle part of a lode, or otherwise than at the top and apex, which will enable the locator to go beyond his line.

I will say to counsel in that case, which is not for the consideration of the jury, that it has always been a question in my mind whether a location made on the dip of a vein would not be valid as against one of later date higher up. That is to say, whether if a location be made upon the dip of a

vein, the locator may not pursue it in the downward course although he may not in the upward course, and may not hold the whole which lies within his location and below it, as against any one locating subsequently at a higher point on the same vein. I admit that that question is presented in this case, but after some consideration, as this is the doctrine generally accepted in this State, I have concluded to adhere to it, and leave the consideration of the question for the Supreme Court, if there be anything in it.

In that view, if you find the fact to be that the vein has no end or terminal point in the plaintiff's ground, the law is with the defendants. But if you find the top or apex in plaintiff's location, as before defined, the law is with the plaintiff.

Now I have one word further of explanation: the testimony is to the effect that in going down to the westward in those winzes that were sunk down some twenty-seven or thirty feet, there was ore in the bottom, and it was not shown that this continued without the plaintiff's ground; and I think that the defendants' theory is, that if this point reached at the bottom of these winzes was lower than any other within the location, so that in going to the eastward, the general elevation would be upward, that is, taking the direction from both points, the bottom of the winzes and the east side of the location or the general course would be upward, that the plaintiff is thereby defeated. That is not my view of the matter. In my view, if this should be no more than a wave in the limestone and the terminal points of the ore within the plaintiff's location, the plaintiff might select any point as the apex of the vein, from the bottom of the winzes to the highest point which they reach. In other words, the vein must proceed across and without the plaintiff's claim to the westward in order to defeat the action upon the ground that the location is in the middle of the vein. Of course, gentlemen, you will remember the evidence as to the shafts down the hill and, on that subject, that may be considered in connection with the evidence in regard to these winzes. If you find it is a continuous body of ore, extending from the eastward, over the high point in the limestone and down to the west, beyond the plaintiff's location, it is enough.

The substance of these matters, all that is very important for you to remember, gentlemen, is in this paper, and that you will have in your retirement. There is one here, in the prayers of the defendants, that should be given: "If you should find for the plaintiff, in any event you can only find for them to the extent of the top or apex as developed in the Iron claim; and in the verdict that you return, if it should be for the plaintiff, you will state the extent of the lode to which the plaintiff is entitled." I think that was, by the assumption of counsel, in some of their requests that were made, some 316 feet. I suppose there is no objection to that being considered as the extent.

The jury retired, and after a short deliberation returned a verdict for the defendant.

For opinion of HALLETT, D. J. on motion for injunction in this cause, see title DIP.

*** STEVENS ET AL. V. WILLIAMS ET AL.**

(Carpenter's Mining Code, 65. U. S. Circuit Court, District of Colorado.)

Lode in place. A lode is in place when it is inclosed and embraced in the general mass of the mountain, and fixed and immovable in that position, and it is not material that the vein matter is loose and disintegrated.

Top or apex defined. The act containing these words was framed upon the hypothesis that all lodes and veins stand upon their edge in the body of the mountain, and the words top and apex refer to the part which comes nearest to the surface.

Location—Dip. The lines of a location should be parallel with the top of the lode, and if the line of the lode departs from the surface lines, of the location, the locator takes no part that lies without such surface lines; but if the lode in its downward course into the earth, departs from the lines upon the side, the locator takes that part also.

Perpendicular. A lode which has an inclination of more than forty-five degrees from the vertical course, departs from the perpendicular, and it is merely a verbal distinction to say that such a lode departs from the horizontal plane.

Contact veins. If the deposits of ore are irregular along the line of contact of two kinds of rock, as porphyry and limestone, a lode can not be

* S. C. on second trial, *post* 566.

said to exist if the contact is barren of mineral or ore, for any considerable distance; but if there is a practically continuous body of ore, and no such interruption as exhibits other than a casual and fortuitous displacement, then it would be a lode.

Charge to jury by HALLETT, J.

The first matter to which I shall ask your attention is, that the reference in the law is to veins or lodes in place bearing any valuable metals which are here spoken of. The language of the act is, mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits. That is the language of the act, used in describing the kind of mines or valuable deposits which may be taken under the act, and the peculiar feature of that description to which I wish to call your attention is, that they are lodes or veins in place. The exact language, as I before read, is veins or lodes of quartz or other rock; that is veins of quartz or other rock, or lodes of quartz or other rock (the last words being added to the first by way of description) that may contain any of these valuable metals. That is to say, any kind of rock bearing any of these metals—but whatever the rock, whether it be quartz or other rock, it must be in place. And, as to the meaning of these words, “in place,” they seem to indicate the body of the country which has not been affected by the action of the elements; which may remain in its original state and condition, as distinguished from the superficial mass which may lie above it. There are quite a number of words which may be applied to that superficial deposit; that which is movable as contrasted with the immovable mass that lies below, such as alluvium, detritus, debris. Perhaps the last word comes as near as any other that is in use—the word debris. A witness in another case here used a word which he appeared to have invented for the occasion, which appeared to me particularly significant; he called it “tumble stuff,” which conveys to my mind pretty distinctly the idea of that which may have been brought to its position by the action of the elements as distinguished from the vast body of earth which lies below. In speaking of these deposits, which are in veins or lodes, and of the general

mass of rock from which they may be distinguished, miners usually call the surrounding mass of rock in which the lodes or veins are found, the country or the country rock. By that word they signify the character and description of the general body of the mountain, whether it is granite, or gneiss, or syenite, or porphyry, or any other of the many different kinds of rock. They use that word to describe the general mass of rock of which the mountain is composed, as distinguished from that which is found in the vein or lode. And when this act speaks of veins or lodes in place, it means such as lie in a fixed position in the general mass of country rock, or in the general mass of the mountain. As distinguished from the country rock, this superficial deposit may have been brought into its present position by the elements; may have been washed down from above, or may have come there as alluvium or diluvium, from a considerable distance. Now, whenever we find a vein or lode in this general mass of country rock, we may be permitted to say that it is in place, as distinguished from the superficial deposit, and that is true, whatever the character of the deposit may be; that is to say, as to whether it belongs to one class of veins or another; it is in place if it is held in the embrace, is inclosed by the general mass—of the country. And as to the word *vein* or *lode*, it seems to me that these words may embrace any description of deposit which is so situated in the general mass of the country, whether it is described in one way or another; that is to say, whether in the language of the geologist, we say that it is a bed, or a segregated vein, or gash vein, or true fissure vein, or merely a deposit; it matters not what the particular description of it may be; in respect to these distinctions, which are observed by geologists in defining the different classes of deposits that lie in the embrace, or are inclosed by, the general mass of the mountain. In all cases I suppose that they are lodes if not veins. It may be true that many of these deposits will not come under the description of veins as known to geologists, but if they are not so described—if they can not be so correctly described—they are, at least, lodes, and are recognized as such by miners in their search for them. In other words, whenever a miner finds a valuable mineral

deposit in the body of the earth, as I have described it, he calls that a lode, whatever its form may be, and however it may be situated, and whatever its extent in the body of the earth. The books make some distinctions between beds and lodes, and they make distinctions in the different classes of veins, as you have heard from counsel, but these distinctions are not important in relation to this matter of the discovery and taking of these mineral deposits. It has been decided that Congress, in passing this act, intended by this description to embrace and include all forms of deposit which are located in the general mass of the mountain, by whatever name they may be known, and the distinctions which are adopted by geologists in respect to the different kinds of veins are not important except for one question and for one purpose, which I may invite your attention to further on. So that we may say, gentlemen, with respect to the case which is now before you, that, whether this may be called a true vein or a contact vein, or a bed; whether it lies with the stratification or transversely to it, the matter is of no importance for the purpose of determining this question; it is in any event a lode, if it lies in place within the meaning of this act. And it is in place if it is inclosed and embraced in the general mass of the mountain, and fixed and immovable in that position. Perhaps I ought to say further, in view of some things that were said by counsel in the argument, that it is not material as to the character of the vein matter, whether it is loose and disintegrated, or whether it is solid material. In these lodes the earth that is found in them, the earthy matter which may be washed or treated with water or steam, is often the most valuable part. It was never understood here or elsewhere, so far as I know, that such earthy matter was not embraced in the location, because it was of that character. It is the surrounding mass of country rock; it is that which incloses the lode rather than the material of which it is composed, which gives it its character; so that even if it be true, as counsel have stated in the course of their arguments, that this is mere sand, is a loose and friable material which can not be called rock in the strict definition of that word, if that be true, it does not affect the character of the lode. If it

were all of that character, it would still be a vein or lode in place, if the walls on each side, the part which holds the lode, is fixed and immovable.

That is, perhaps, sufficient as to the character of the deposit, and that which may be located in the manner in which the evidence tends to prove that the location was made; and we have now to consider the question which was so much discussed by counsel, as to the location with reference to the top and apex of the vein. And upon that point it is clear, from an examination of the act, that it was framed upon the hypothesis that all lodes and veins occupy a position more or less vertical in the earth; that is, that they stand upon their edge in the body of the mountain, and these words, top and apex, refer to the part which comes nearest to the surface. The words used are "top" and "apex," as if the writer was somewhat doubtful as to which word would best describe or best convey the idea which he had in his mind. It was with reference to that part of the lode which comes nearest to the surface that this description was used; probably the words were not before known in mining industry; at least they are not met with elsewhere, so far as I am informed. Perhaps they were not the best that could have been used to describe the manner in which the lode should be taken and located. But whether that be true or not, they are in the act of Congress, and there seems to be little doubt as to their meaning; they are not at all ambiguous. In some instances they may, perhaps, refer to the *flue* of the lode; that is, a part of the lode which has been detached from the body of mineral in the crevice, and flowed down on the surface; in others, where there is no such outcrop, they may mean that part which stands in the solid rock, although below a considerable body of the superficial mass which I have attempted to describe to you. We are all agreed, however—the courts and counsel, every one—that that is the meaning of the words; that they are to be taken in some such sense as that, as being the part of the lode which comes nearest the surface; and the act requires that the location shall be along the line of this top or apex. Supposing the lode to have a somewhat vertical position in the earth, with this line of outcrop or of appearance on the surface, or nearest to the

surface, it shall be taken up and occupied by the claimant as his location, and he must find where this top and apex is, and make his location with reference to that. So that by this act he might claim fifteen hundred feet in length along the linear course of the lode, and would have one hundred and fifty feet on each side of it, making it three hundred feet in width and fifteen hundred feet in length.

*We have already reached this conclusion in this State; the Supreme Court of the State has adopted that construction of the law, that if he fails in that, in so far as that his location is not upon the line of his lode—that he can claim no more than he has included within his side lines; that is to say, he makes his location with reference to the top of the lode, with which the lines of the location must be parallel; and if he fails in that, if the line of the lode departs from the surface lines of his location anywhere upon the length of it, it is so far an invalid location, that he can take nothing of the lode that lies without the lines of the location. This, then, was the method pointed out by this act, and by the law of the State for taking up these claims, that it should be along the line and top and apex of the lode, and if this is done, if the location is so made, then the language of the act is express that he shall have not only so much of the lode within the lines as lies in its linear course, but that if the lode in its downward course into the earth departs from these lines upon the sides, passes out upon its dip, that he shall have that part also, which lies beyond. Congress seems to have appreciated the fact, which is known to all miners, that there are very few, probably no lodes, that are exactly perpendicular to the surface of the earth; they incline one way or the other—that is, either to the right or left—extending along the course of the lode. It seems to be universally true that they depart from the perpendicular in one direction or the other, and if in so departing—if in their downward course into the earth, they depart from their side lines, or the planes of those lines extending downward vertically, then he is to have that part which lies without, as well as within, the surface lines. The language of the act upon that point is, “of all veins, lodes and ledges,

* *Wolfley v. Lebanon Co.*, 4 Colo. 112. *Post*, SIDE LINES. *Patterson v. Hitchcock*, 3 Colo. 533.

throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from the perpendicular in their course downward, as to extend outside the vertical side lines of such surface location."

Now, it was said with reference to the lode which is now in litigation here, the position was taken by the counsel for the defendant, that whenever, in its departure from the vertical course, it reaches an inclination which is greater than forty-five degrees, that then it is no departure from the perpendicular, but from a horizontal plane, and therefore it is not within the terms of the act. That position, gentlemen, is merely a verbal distinction, which goes for nothing at all. Of course, in its departure, it may depart in any degree up to the horizontal plane, and it is still a departure from the perpendicular throughout the whole course, until it comes to a right angle from the perpendicular. I think, perhaps, that we may illustrate that with these books. If we say that this illustrating is the vertical position, as you perceive it is, then, departing from the perpendicular in every angle as you come from this vertical position carrying it up until you come to a horizontal position, (which is ninety degrees, as I understand it, of the arc of the circle), it is still a departure from the perpendicular. In that view, we have been brought to consider, in the present instance, whether the lode or vein lies in a horizontal position; that is, whether the angle of the vein is between the vertical and horizontal. The rule should be that every departure up to that which I have named is but a departure from the perpendicular, and it appears to be exactly within the provisions of this act, if the vein clearly extends outside of the limits of the surface in any angle between the perpendicular and horizontal. I agree that if we should ever find a lode which in its course extends precisely on the plane of the horizon, and it is extremely doubtful whether we shall ever find one in that position, but if we should ever find a lode which is precisely in that position, there may be some difficulty in locating it under this act, but if you find from the evidence, that there is a lode or vein in the position in which this has been described by the witnesses, and that it is in rock

in place as I have described it to you, I think there can be no difficulty in the present instance in respect to that.

This brings us to a question, gentlemen, which really is the important question in this case, and that is, whether there is any lode in the position which has been mentioned by the witnesses; and in that connection, in the consideration of that question, the character of the deposit, as to whether it is a true fissure vein, or a contact deposit, or a bed, or something of that kind, is of some value; because in respect to fissure veins we accept the cavity or chasm which is found between walls, and filled with what they call vein matter, as indicating or showing the existence of the lode, even if the matter which is found in it is not very valuable—that is, if there is anything which usually accompanies valuable ores or minerals. But in respect to this kind of deposit, my impression is that it is to be known, called and regarded as an irregular deposit; one which, if it should be interrupted for any considerable distance—that is, if what they call the contact or junction between the porphyry and lime, should become barren for a considerable distance—that it should no longer be called a lode. As I understand it, this line which exists, which always exists when there is a union of rocks of different ages and different formation, may carry ore or it may not; it may be productive or it may be barren; and if this should be found at any point in its course to become barren, and remain so for any considerable distance, I do not see how it could be called a lode in that part of it, so that it could be followed with the result to claim what lies beyond. I should say that with reference to such a line of contact between rocks of different formation, that to find that line of contact in one place, unless there were in it valuable minerals which were carried along with something like a continuous course along the line of contact, that no lode would be discovered. It could not be said that any had been found until such minerals were found. I do not mean by this, that any slight interruption for a few feet of the valuable part of the ore would have the effect to show that the deposit was broken in its continuousness.

I do not mean that nor do I mean that if any dyke or other

extraordinary foreign matter should be interposed in the course of the lode so as to cut it off, and it should follow on immediately after that interruption, that would be regarded as such a displacement in the continuity of the deposit as would deprive it of its regular character. *Whenever it may appear that the fissure has existed at one time, or at any time, with a continuous body of ore in it, which may have been interrupted by some subsequent convulsion, the character of the deposit would remain the same as if the interruption had never occurred. But if there was such an intervening space in the contact, as these witnesses call it, barren in its continuity, as might show a separate and distinct body of ore, which had always been such, I should say that it would not pass with the grant of the first. It may help you, gentlemen, for me to express this in other language, and ask you to extend the line which is laid down on that map (showing), for some distance further, and to suppose that in the course of that line, you find that there is, at the head of the deposit, *that* nearest the surface, a hundred feet or more of continuous ore lying upon the line between the porphyry and the lime, and then there should be an interruption of a hundred feet or more of this contact which is perfectly barren; the lime and the porphyry coming together carrying nothing whatever, and below that again, another body similar to that which was found at the head, the position which I think might be taken upon this, the position of these ore bodies, would be that there would be two lodes, rather than one, the first above and the second below; but if there is a continuous body of ore, or practically continuous, and there is no such interruption as exhibits other than a casual and fortuitous displacement, then it would be one lode.

I think upon that explanation, gentlemen, you will be able to determine whether there is, in that sense, a fixed body of ore, extending from the upper part of these workings to the end of them; if that is its character, then it is to be regarded as one and the same lode, though it may have departed from the side line to a considerable distance, and have only an angle of thirteen, fourteen or fifteen degrees, as the witnesses have described it, from the plane of the horizon.

* *Phillpotts v. Blasdel*, 8 Nev. 61. *Post*, DESCRIPTION.

There may be other deposits in that neighborhood, gentlemen, which show entirely different features, or show the same features, but whether that be true or not, is not a matter for present consideration. We determine these questions only upon what appears in this case, and without reference to any others that may arise in the same locality. Other deposits in this neighborhood may be of an entirely different character; they may be such as can not in any sense be called lodes at all. Whether this is true or not, is not for present consideration. We determine this case, as I said before, upon the evidence given here, leaving other questions which may arise in respect to other locations, to the facts as they may be developed in respect to them.

*** STEVENS ET AL. V. WILLIAMS ET AL.**

(1 McCrary, 480. United States Circuit Court, District of Colorado, 1879.)

Lode or ledge defined. A vein, lode or ledge, within the meaning of the act of Congress, is a mineral body of rock within defined boundaries in the general mass of the mountain.

Top or apex. The top or apex of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein. If a vein, at its highest point, turns over and pursues its course downward, then such point is merely a swell in the mineral matter, and not a true apex.

† Following vein. Where there is a true apex within the surface boundaries of a claim, the claimant can follow the vein in its downward dip beyond his vertical side lines, and he may follow the vein beyond such side lines at any point where the apex is within his surface lines, even though his location for the full length of the claim be not along the line of such apex; and he is entitled to follow the same in its departure from the perpendicular, in any degree, until it reaches the horizontal.

CHARGE BY MILLER, Circuit Judge.

Gentlemen of the jury : After a very long and patient investigation of the case with the aid which eminent counsel

* S. C. first trial, ante 557.

† *The Flagstaff Case*, 98 U. S. 463. *Post*, LODE.

have been able to give to you and to the court, we approach a point where you and the court must act in the decision of the questions presented in the case. It is a satisfaction to me to state, if my experience is of any value, that I have very rarely seen as many witnesses in so important a case as this, where they have testified so frankly, and where I have been so perfectly convinced of their integrity. * * * And as this is my first case upon important mining matters—a class of cases coming more rapidly into the courts than heretofore—I hope that the miners will always deserve the character which I am happy to give them in this case, of being true and honest men in what they endeavor to state.

There are some things, gentlemen, of which I propose to disabuse your minds before entering upon the real merits of the case. A great deal has been said about the immense value of the interests at stake, and I think counsel on both sides have intimated to you that your verdict may settle rights of property to a very large amount outside of the case now in controversy. That is quite a mistake; your verdict settles nothing in the world but the matter in controversy between these parties. Even the opinion which the court delivers, that, perhaps, may hereafter be used in similar cases as settling principles, but for which you are not at all responsible, may be and probably will be revised by the highest court of the country, the Supreme Court of the United States. So that in delivering this opinion, my brother HALLETT and myself are not deciding principles finally which govern anybody's case, possibly not even this case. Therefore, do not be frightened; do not be alarmed; do not bring in any other verdict than what you would if this were a simple controversy between the owners of the Iron mine and the owners of the Grand View mine, for that is all there is in this case.

The plaintiff has asked certain instructions here which I have refused, in regard to the testimony, and I regret that they should have been introduced into his prayer for instructions, but I will rule upon them so that he can get the benefit of them if he desires. I am asked by him to state that the patent which he has received from the United States for the Iron mine is conclusive; that the sheet of mineral matter in question is a vein, within the meaning of the statute. I de-

cline to give that instruction. Certainly, outside of the vertical projection of the side lines of the plaintiff's patented ground, if the defendants can show that the mineral matter which is the subject of this controversy is not a vein, they have the right to show it. Outside of the side lines of the plaintiff, projected perpendicularly downward, defendants have the right, if they can, to show that the vein, or thing which is called a vein, is not a vein.

After disposing of that much of the preliminary matter, I now proceed to state to you what I understand to be the nature of this controversy. The plaintiff has a patent from the United States, which has been read to you, for a mine or lode of mineral matter, the superficial area of which is three hundred feet in one direction and fifteen hundred in another, on the surface of the earth, as known and measured by the lines which have been pointed out to you and are called the end and side lines of the Iron mine. The act of Congress on that subject says, that when such title or patent and such side and end lines cover the top or apex of a vein of mineral matter, if the party pursuing that vein in a downward direction, as he pursues it further, escapes from the perpendicular extension of these side lines, he may still follow that vein as long as he can find it, and so long as it is the same vein. That part of the statute is the source of this controversy. The plaintiff, acting upon that act of Congress, has pursued what he calls his vein, has pursued it a very long distance, as shown by that incline on the map which is the most continuous, outside of his side lines across the side lines of another claim and into the claim of the defendants. If it is a continuous vein of mineral matter, and if his side lines cover the apex or outcrop of that vein, and if those lines are extended in a proper direction across the shoot or course or strike of that vein matter, he has the right to pursue it. The defendants, commencing at another point on the surface of the earth and descending perpendicularly as shown on the map, have come to a point where their shaft intersects the incline which the plaintiff has made in the pursuit of his mineral, and the contest is for the mineral matter where these two shafts meet, so far as the defendants' claim covers, or may be supposed to cover it.

Now, I state to you in the first place, if that is a vein of mineral matter, within the meaning of the act of Congress, and in the second place, if the plaintiff's side lines are laid along the course or shoot of that vein, and inclose its top, apex or outcrop, and if the plaintiff in the pursuit of that vein into the bowels of the earth, pursued it downwards continuously, he is right in this controversy, and he should obtain your verdict.

The defendants say they are entitled to your verdict upon three principal grounds.

1. They say that the mass of mineral matter which is the subject of this controversy is not a vein, lode or ledge, within the meaning of the act of Congress.

2. That what the plaintiff claims to be the apex, or top or outcrop of this lode is no such thing, but is a mere elevation of the general position of this sheet of mineral matter, and from that point it continues on a westward dip, and, therefore this is not an apex, but merely a swell in the mineral matter. And:

3. That the plaintiff has not so located his said lines and end lines with reference to the strike or course of the mineral as to entitle him to the benefit of that statute.

Now, these are the three points to which your attention is to be directed, and about which I propose to lay down some matters of law which will govern you in the case. But before I proceed to give my own views in the matter, and because it will, perhaps, facilitate any exceptions that may be taken, I will read to you certain prayers for instructions asked by the defendants in this case, some of which I will give to you, others I will modify, and others I will refuse. The first one which I think is sound law, is as follows: "In addition to the evidence of the title furnished by the patent, the plaintiff must show by a preponderance of evidence that he is the owner of a body of mineral on his patented ground; that such mineral constitutes a vein of quartz or other rock in place; (and there I want to say that by rock in place I do not mean merely hard rock, merely quartz rock; but any combination of rock, broken up, mixed up with minerals and other things, is rock within the meaning of the statute, because it does not say common quartz rock alone, but it

says "that such mineral constitutes a vein of quartz or other rock in place;") "that being such a vein it penetrates the land in controversy, known as the Grand View claim;" (if it is such a vein and runs under the surface of the earth, if it goes to the perpendicular lines of the Grand View claim, that is what is meant); "that the top or apex of the vein is within the surface lines of the Iron lode location, and where it enters the land in dispute it does so in a downward course departing from a perpendicular." Counsel have inserted here "that at the respective points where it leaves the Iron mine location, and where it enters the land in dispute, it does so in a downward course, and departing at both said points from a perpendicular." I have cut out so much of that as says "that at the respective points where it leaves the Iron mine location." I think if the general course of the vein is a departure from the horizontal, that it covers the case. With the exception of striking out that single point, "that at the respective points where it leaves the Iron mine location," I give that instruction.

Second. "And if these conditions are fulfilled it must also appear that the location of the Iron mine is laid upon the general course, or strike; that the vein mentioned departs from the plaintiff's location at a point on its general course within the patented side lines." That is correct. The long lines of the plaintiff's claim must be so laid, with regard to the general course or strike of the vein, that in pursuing it you pursue it to the end lines, or where it leaves the side lines within those end lines.

Third. "Although the area of ground within the patented lines of the plaintiff extends fifteen hundred feet in a northerly and southerly direction, by three hundred feet in width, plaintiff is only entitled to so much of the Iron lode along its general course as is embraced within his side lines; and if the body of mineral within the patent deflects on its general course, so as to cross the side lines, plaintiff has no right to go beyond such lines to follow it. If, therefore, the supposed vein of quartz or rock in place, departs from a perpendicular in its downward course, at any point on its course or strike outside of plaintiff's side lines, and then enters the land in controversy, plaintiff can not by reason

of 'this recover in this action.' I refuse that for two reasons; if it means anything more than the language given in the previous instructions, I do not give it. In the second place, it is complex and confusing to the jury. I can hardly understand it myself, and, therefore, I presume you could not understand it better than I can.

The fourth one I refuse. "In addition to the things already mentioned as essential to the plaintiff to recover in this action, the vein of quartz or rock in place" must be "one which in its descent into the earth is substantially vertical in its direction"—that is, straight down,—“which on leaving the side lines of the plaintiff and entering the land in dispute, departs from a perpendicular and not from a horizontal direction.” I refuse that; if there is any departure from a horizontal direction in a downward course, it is sufficient.

The sixth one is: The "top" or "apex," within the act of Congress, is the highest end or termination of the vein, and this is so, even though at any intermediate point or points, where the vein is continuous it rises higher than such highest end, it being essential to such "top" or "apex" that there be no vein continuing beyond it. I give that. It must be the end of the vein which approaches nearest to the surface, as I shall explain more fully in another part of the charge. That is the substantial meaning of it.

The next, number seven is: "In order to constitute a vein of quartz or other rock in place, which will entitle the plaintiff to follow it into the land of another, it is not enough that there be a seam or crevice between rock in place filled with mineral, but the mineral contained between the rock in place must be of 'quartz or other rock.'" I have explained already to you, the meaning of *other rock*, that it did not mean solid rock necessarily, but it means any rocky substance containing mineral matter, "and unless plaintiff has shown by a preponderance of evidence, the contents of the supposed vein to be of 'quartz or other rock,' he can not recover, for, under the act of Congress under which plaintiff claims, all forms of deposit, excepting veins of quartz in rock in place, are placers." I give that instruction, but with the distinct understanding that all this substance between the porphyry and limestone

that has been explained to you, which contains mineral—I mean which contains ore,—is rock in place.

The eight instruction, “although the jury believe from the evidence that the plaintiff is the owner of a vein of quartz or rock in place, yet if such vein on its course toward the land in dispute, be interrupted for a considerable distance, then it ceases to be a lode or vein so as to give the plaintiff the right to pursue it into the adjoining land, and in such case the plaintiff can not recover.” I refuse that instruction. In the first place the evidence is uncontradicted—at least so little contradicted I would not dare to put that to the jury—that that main incline has metallic ore in it from beginning to end, as far as it has been carried; and in the second place, the words “considerable distance,” do not convey any accurate conception. In some cases a mile would be a “considerable distance,” and in some cases, where a life depended on it, half an inch would be a considerable distance.

There is another matter asked by the counsel, which I think is too complex, and I refuse it upon other reasons. I shall, however, charge the jury upon the whole of that matter.

Now, gentlemen of the jury, as I make out the subject-matters to be considered by you in this case, the first one of them for you to determine is, what is a vein, lode or ledge of mineral matter within the meaning of the statute, and in regard to that matter, I apprehend you will have no great difficulty in this case. The statute of the United States, in determining the terms on which its mineral lands shall be sold, used or occupied, has divided mineral lands, at least all that relate to precious metals, into two distinct classes: they are those which are called placer mines and those which are called veins, lodes or ledges of mineral matter in quartz or other rock in place.

Now I do not know that I can better define what is a vein, lode or ledge to you, than has already been done by my associate on the Supreme bench, Brother FIELD, whose learning on that subject is equal, perhaps, to that of any judge of the United States courts, and whose diligence and precision are equal to his learning. Without going over all that he says about it, most of which was read to you by Mr. Symes, I adopt and instruct you that a “continuous bed of mineralized

rock, lying within any other well-defined boundaries on the earth's surface and under it, would constitute a lode, and that the term is used in the acts of Congress as applicable to any zone or bed of mineralized rock, lying within boundaries clearly separating it from the neighboring rock. It is any class of deposits of mineral matter coming from the same source, impressed with the same forms, and appearing to have been created by the same process." * * * I am also aided by my Brother HALLETT, whose experience is greater than mine in this matter, and who has also given the definition of the word which I propose to read to you as the law: "In general, it may be said that a lode or vein is a body of mineral or mineral body of rock, within defined boundaries in the general mass of the mountain;" and I do not know a better or more comprehensive definition than that. I say to you, further, gentlemen, that the thinness or thickness of the matter in particular places does not affect its being a vein or lode; nor does the fact that it is occasionally found in the general course of this vein or shoot, in pockets deeper down into the earth or higher up, affect its character as a vein, lode or ledge.

I say to you, further, that a total interruption of the ore matter, if the contact remains on each side, the limestone and porphyry are still preserved, and the vein of mineral matter is found within a short distance further on, pursuing that same contact, it is still a part of the same vein. In short, if there is a general and pervading continuance of this mineral matter with a casual and occasional interruption, but pursuing the same general course, bounded by the same rocky material above and below as far as you can trace that until it breaks off totally, and is interrupted for a very large distance, it is a vein of rock or mineral matter. Now I think you will have no difficulty in applying these definitions, since the evidence here is almost uncontradicted that there is such a sheet of matter as is spoken of. All the witnesses agree that there is a substratum of limestone and a superstratum of porphyry; all agree, even defendants' witnesses, that they come to a point where that contact is so narrow that only a sheet of paper could be got into it, but still it has the well preserved distinction—the porphyry above, the lime below and, although

in some instances to the south, some to the north, and some occasional spots in the levels, it is stated by defendants' witnesses, that no more vein matter has been found, yet you must, I think, come to the conclusion that on the whole, and taking the course on which this matter is in contact from the line of the plaintiff's location to the line of the defendants' location, taking the course of that large incline shaft, driven by the plaintiff from where he first discovered it to where it meets the defendants', it is for you to say from the testimony, not for me to find for you. But I can see no reason why you should not say there is a continuous vein of mineral from the opening shaft, the plaintiff's shaft, to the point where it reaches the Williams shaft. If that is true—if you find that to be true, why, notwithstanding these casual interruptions in various directions; notwithstanding the widening, the narrowing, the deepening and the shallowness of the vein; notwithstanding it has, in some places, acknowledged diversions down into the ground, still, if the miner is able to pursue and has been able to pursue it in the vein, notwithstanding these interruptions, you are to call it a vein and treat it as a vein within the meaning of the act of Congress.

The next point is, that it is denied that there is a top or apex to this ledge or vein, and that if there is such a one it is not within the side lines of the plaintiff's patent. Perhaps upon that point the defendants have mainly rested their case. I think that you will agree with me, as all the counsel agree and all the witnesses agree substantially, conceding that there is a vein, that the top or the apex of a vein, within the meaning of the act of Congress, is the highest point of that vein where it approaches nearest to the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein. The word "outcrop" has been used in connection with it, and in the true definition of the word outcrop, as it concerns a vein, is probably an essential part of the definition of its apex or top; but that does not mean the strict use of the word "outcrop." That would not, perhaps, imply the presentation of the mineral to the naked eye, on the surface of the earth, but it means that it comes so near to the surface of the earth that it is found easily by digging for it, or it is the point at which the vein is nearest to the sur-

face of the earth; it means the nearest point at which it is found toward the surface of the earth. And where it ceases to continue in the direction of the surface, is the top or apex of that vein. It is said in this case that the point claimed to be the top or apex is not such, because at the points where plaintiff shows or attempts to prove an interruption of that vein, in its ascent toward the surface and what he calls the beginning of it, the defendants say, that is only a wave or roll in the general shoot of the metal, and that from that point it turns over and pursues its course downward, as a part of the same vein, in a westerly or southwesterly direction. It is proper, I should say to you, if the defendants' hypothesis be true, if that point which the plaintiff calls the *highest point*, *the apex*, is merely a swell in the mineral matter, and that it turns over and goes on down in a declination to the west, that it is not a true apex within the statute. It does not mean merely the highest point in a continuous succession of rolls or waves in the elevation and depression of the mineral nearly horizontal.

Now, gentlemen, I have but one more matter, and really I do not know that there is much to be said about that. The defendants maintain that the lines—the side lines—of the plaintiff's claim are so located in reference to the shoot or strike of the vein which they claim to pursue, that he has no right to pursue it at the point where this controversy exists.

You must take all the evidence together; you must take the point where it ends on the south, where it ends on the north, where it begins on the west and is lost on the east, and the course it takes, and from all that you are to say—what is its general course? The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode so as to cover it exactly. His location may be made one way or the other, and it may so run that he crosses it the other way. In such event his end lines become his side lines, and he can only pursue it to his side lines vertically extended, as though they were his end lines; but if he happens to strike out diagonally as far as his side lines include the apex, so far he can pursue it laterally; if the vein projects beyond his side lines then it is only a question as to the distance which he can in-

clude this vein within his side lines, which I don't see arises in this case at all; but that is for you to say.

Now, gentlemen, I have laid before you all that I think material for your judgment in this case. If you believe that that is the top or apex of the vein on which the plaintiff has laid his claim; if you believe that is a vein within the meaning of the act; if you believe that is a vein under the circumstances and definitions which I have given you; if you believe that in pursuing that vein to the east, or slightly to the north-east, the plaintiff has followed substantially a continuous sheet of ore, although with occasional interruptions, occasional narrowings, occasional enlargements and occasional pockets, yet if it is substantially the same vein and sheet of ore, and he has followed it and found the defendants in possession in the line of his openings, the law is with the plaintiff. If you do not believe all of these propositions are established, the verdict will be for the defendants.

STEVENS ET AL. V. GILL ET AL.

(United States Circuit Court, District of Colorado.)

Contact veins—Rock in place—Dip. The joinder or union of rocks differing in character, as porphyry and limestone, is not a mineral vein or lode, unless the intervening space contains ore of appreciable value; and the fact that ore is sometimes found between such rocks, does not change the case. If the ore does exist between the two varieties of rock, then in order to constitute a lode or vein the rock must be in place, *i. e.* in its original position in the structure of the formation. If the plaintiffs have the apex of a lode as thus defined upon their ground, and it descends thence into defendants' ground, the plaintiffs have the better title.

Burden of proof. The burden of proof is upon the plaintiffs, both because they are the plaintiffs, and because they are seeking to go out of their own territory into that claimed by others.

Ejectment. Bull's Eye v. Silver Wave Lode.

G. G. SYMES, W. S. DECKER, J. Y. MARSHALL and C. S. THOMAS, for plaintiffs.

HUGH BUTLER, E. O. WOLCOTT, HIRAM P. BENNETT and T. M. PATTERSON, for defendants.

HALLETT, J. (charging jury).

Having heard the evidence in this case, gentlemen, and the arguments of counsel, you ought now to be prepared to decide the questions in controversy between these parties. There is some difficulty upon the pleadings here in determining precisely what extent of ground is in controversy between the parties. The plaintiffs claim by their declaration or complaint the ground which is within the line of the first incline on the Bull's Eye lode—that is to say, they claim that the defendants have ousted them from that portion of the lode which lies within the Silver Wave location. Further on, as you have heard from the evidence, the defendants, or some of them, are in the occupation of the same claim by more extensive workings. That point is called the main incline on the Silver Wave lode, and there, as I think Mr. Doyle told you in his evidence, the workings of the defendants are quite extensive. It is a little extraordinary that the action should be brought for a small portion only of a claim if the plaintiffs do, in fact, claim the whole of it; and I am a little at a loss to determine from the pleadings or from the statements of counsel what the extent of their damage is in respect to the Silver Wave claim. I think, however, we ought not to be governed precisely by the statement in the complaint as to their location; if you find for the plaintiffs you ought to find some part or portion of the northern end of that claim, as belonging to them so that the precise matters as adjudged between them may be determined. That is to say, you ought to find a certain number of feet extending from the north end of the claim as their property, without adhering precisely to the points stated in the complaint. You will remember I asked at the close of the testimony some of the witnesses to give the distance from the north end of the claim to the first and second incline and to the shaft on the Bull's Eye claim opposite the main incline on the Silver Wave workings. These distances were given: To the first incline, forty-five feet; to the second incline, 135 feet, and to the shaft opposite the Silver Wave workings, 250 feet.

Probably the theory of the plaintiffs is that somewhere at a point between the second incline of the Bull's Eye and the main incline of the Silver Wave, or at the shaft opposite that incline, the lode passes from their ground into that of the defendants, and, as I said before, if you find for the plaintiffs, I think you ought to determine with some degree of certainty, what that point is.

Now you have observed in general that the parties here have no controversy as to the surface of the ground. The defendants' location lies parallel with and alongside the plaintiffs' location, and immediately east of it. So far as the ground in dispute is concerned, there is no conflict on the surface, but the plaintiffs claim the right to pursue the lode which they say they have in their own territory, out of their territory and into that of the defendants. Upon that the principal question relates to the top and apex of the lode as to whether it is within the plaintiffs' location or in that of the defendants, and as that is the principal point in the case, I have written what I wish to say to you upon that subject as follows:

Upon the evidence before you it may be assumed that there is a lode in the Silver Wave location, and, the principal question for your consideration is to determine the situation of the top and apex of that lode with reference to the locations. You have observed that the claims are contiguous and parallel to each other, the defendants' claim lying immediately east of that owned by the plaintiffs. The act of Congress provides that one who locates and acquires title to a vein, may follow it to any depth within the end lines of his location; although in its downward course it may enter the land adjoining. And so, also, as to all other veins having their tops within the surface lines of the location extended downward vertically, so that it is often a question whether the top and apex of the lode is in one place or another, as the matter of ownership may turn upon that point. And that is the main question in this case; for if the plaintiffs hold the top and apex of the lode in their ground, they may, by the express language of the act of Congress, before mentioned, follow it from their own territory into that owned by the defendants. That proposition may be stated in other language; as, whether the lode is to be found in

the plaintiffs' ground, and thence extending eastward into the defendants' ground, or in defendants' ground only.

On that subject you have observed that the witnesses concur in saying that the line of contact between the porphyry and lime rock extends more or less definitely into the plaintiffs' territory for a distance of about one hundred feet. They are not agreed whether the porphyry rock overlying the lime is in massive condition or in the condition of slide or debris on the surface of the mountain. Nor are they agreed whether the material found between the lime and porphyry is of the country rock or vein matter, and whether it is of value. It will serve our purpose to put out of view for a moment these points relating to this line of contact in which the witnesses are not agreed, and consider whether upon the assumption that the line of contact between porphyry and lime extends from plaintiffs' ground into that of the defendants' without more, that is to say, without anything of value therein; so far as it is found in plaintiffs' ground it may be regarded as a lode or vein within the meaning of the act of Congress. And that is easily answered in the negative. For, whatever may be said of true fissures, it must be conceded that the joinder or union of rocks differing in character or of the same character, is not in itself a lode or vein. And if, in some spaces between such rocks there is found a material which sometimes or frequently exists with the valuable ore in lodes, the case is not different. As to all such contacts and all such deposits as are found in the neighborhood of Leadville, a lode can not exist without valuable ore, but if there is value the form in which it appears is of no importance, whether it be of iron, or manganese, or carbonate of lead, or something else yielding silver, the result is the same. The law will not distinguish between different kinds and classes of ore if they have appreciable value in the metal for which the location was made. Nor is it necessary that the ore shall be of economical value for treatment. It is enough if it is something ascertainable, something beyond a mere trace, which can be positively and certainly verified as existing in the ore. In the case of silver ore the value must be reckoned by ounces—one or more—in the ton of ore, and if it comes to that it is enough, other conditions being satisfied, to establish the existence of the lode.

If, therefore, you find from the evidence that there is a line of contact between the porphyry and lime in plaintiffs' ground extending thence into defendants' ground, and in some space on that line there is a material different from the enclosing rocks, whatever that material may be called, in respect to whether it is a lode or vein, it shall be judged according to its *value*; and this is true whether the material so found is or is not such as is sometimes or often associated with valuable ore in the deposits in the neighborhood of Leadville. Whatever the rule may be as to true fissures, what is commonly called the "contact" is not, in the absence of valuable ore, to be regarded as a lode or vein. Nothing will be said in this connection as to what rule shall be applied in the case of interruptions in the ore body or barren spaces in the contact when it has been proven to be of value to some extent from the surface. Because upon the evidence before you, whatever your conclusion may be as to the value of the material in the contact, you will probably find it to be continuous from a point a little below the surface in the first incline, down to that place in defendants' ground from which valuable ore was taken. If, then, you say that the material in what the witnesses called the contact throughout plaintiffs' ground is not of appreciable value in silver within the rule already given, there is no lode or vein in that place, and the law is with the defendants.

On that point, however, the evidence is contradictory, and if, on the other hand, you find from the evidence that the material is of value and that it is continuous from the plaintiffs' ground into that owned by defendants, a further question will arise as to whether it is "in place." The act of Congress speaks of veins or lodes *in place*, by which, according to our interpretation, it is required that the vein or lode shall be in the general mass of the mountain. It may not be on the surface, or covered only by movable parts called slide or debris. But if it is in the general mass of the mountain, although the enclosing rocks may have sustained fracture and dislocation in the general movement of the country, it is *in place*. In this instance it is claimed by defendants that the porphyry overlying the lime is not *in place* anywhere in plaintiffs' ground, and if that be true it can not be said that

the lode is *in place* if one exists there. The distinction to be made is, whether the porphyry in plaintiffs' ground is part of the general slide and debris of the mountain, or stands in its original position in the structure of that formation. It is enough if it is found in place at any point west of plaintiffs' east line for, in this instance, the lode, if there is one, must come into place with the overlying rock.

Upon this explanation if you are able to say on the evidence that there is a lode and that it is *in place* in plaintiffs' ground and that it descends thence into defendants' ground your verdict should be for the plaintiffs. If there is no lode or it is not in place in plaintiffs' ground your verdict should be for the defendants. So much, gentlemen, as to the principal points. I should have said to you before that as to the ground claimed by the defendants and plaintiffs you may, upon the paper title given in evidence and upon the proof of occupation given by each of the parties, assume that they are the owners of their respective claims and that each is entitled to the ground in his own location, subject to the qualification I have stated.

As to the weight of evidence and the burden of proof, I have been asked to say to you, and I say accordingly, that it is upon the plaintiffs. It is upon them because they are the plaintiffs in the action, and they are required to prove their right of action as against the defendants; and, also, because in cases of this kind, where one party seeks to go out of his own territory, into that claimed by another, the burden is upon him to show his right to do so; that is to say, he must prove by a preponderance of testimony that he has a lode within his own territory, and that he has the top or apex of it, in order to go out of his own territory in pursuit of that lode. He can not otherwise claim the right to enter ground, or enter upon the possession of it, not within his own location. So that, upon that, the burden is upon the plaintiffs to show to you by a preponderance of testimony, that is, by the greatest weight of testimony, if I may so express it, that they have the lode within their own ground according to the definition which I have given you, and that it proceeds from thence into the ground claimed by the defendants.

A further question: If you find for the plaintiffs, as to the

damages to which they are entitled. They have claimed in their complaint, and they are entitled to recover if they own this lode, for the ore removed by the defendants in this first incline. You remember what the testimony was upon that subject. You remember the statements made by Mr. Doyle, and about his statement as to the value of the ore removed by the defendants from that incline, and if the plaintiffs are entitled to that ground they are entitled also to recover the value of that ore.

I do not think of anything more, gentlemen, which it may be important to say to you. The principal question for your consideration is contained in this writing which I will hand to you and you may take with you to your room.

1. See note to *Stevens v. Williams*, ante 566, following the case as reported in 19 Am. Law Reg. 304.

2. All the above decisions printed under "Apex" are from the same court, and arose out of locations on the carbonate beds near Leadville, Colorado. These deposits are now generally conceded to be contact veins, essentially flat and sedimentary, and not fissures in any sense. That a lode claimant can not follow the vein on its *strike*, except so far as the apex has been covered by his surface lines, has been frequently decided: *Golden Fleece Co. v. Cable Co.*, ante 120; *The Flagstaff Case*, 98 U. S. 463, *post* LODE; *Wolfley v. Lebanon Co.*, 4 Colo. 112, *post* SIDE LINES; but the decisions printed *supra* refer to following the vein on its *dip* beyond the side lines. This has never been disputed where the vein is a true fissure, or belongs to a class of veins which are essentially perpendicular in their nature—apt to vary from it only a few degrees, except in rare instances; but that the benefit of the dip was intended for a class of deposits essentially horizontal in their deposition (like coal beds), has been generally denied by the profession, and the contrary is not apt to be yielded till decided by the courts of last resort. To the same effect is the note from the American Law Register above cited, and Morrison's Mining Rights, 5th Ed. p. 96.

See DIP and SIDE LINES.

¹ ATCHISON V. PETERSON.

(20 Wallace, 507; Blanchard & Weeks' Leading Cases, 730. Supreme Court of the United States, 1874.)

Common law water rights changed. At an early day the doctrine of the common law relative to riparian owners was found to be inadequate to the protection of miners in the Pacific States and Territories, as respects the use of water for mining purposes, and the first appropriator is regarded, except as against the government, as the source of title; but the right to water by prior appropriation on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made.

What will constitute invasion of water rights. What diminution of quantity or deterioration in quality will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case; and, in controversies between him and parties subsequently claiming the water, the question for determination is, whether his use and enjoyment of the water, to the extent of the original appropriation, have been impaired by the acts of the other parties.

² **When court of equity will interfere.** Whether, upon a petition or bill asserting that the prior rights of the first appropriator have been invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

Appeal from the Supreme Court of the Territory of Montana.

Atchison and others filed a bill, in the District Court of the Territory just named, for an injunction to restrain Peterson and others from carrying on certain mining operations, on a creek in the county of Clark and Lewis, in the said Territory, known as Ten-mile Creek. The bill alleged that the water, diverted by the complainants from the stream for mining purposes, was deteriorated in quality and value. It appeared from

¹ S. C. below, 1 Mont. 561.

² *Derry v. Ross*, ante 1.

the evidence that the complainants were the owners of two ditches or canals, known respectively as the Helena water-ditch and the Yaw-Yaw ditch, by which the creek mentioned was tapped, and the water diverted and conveyed a distance of about eighteen miles to certain mining districts, known as the Last Chance and Dry Gulches, and there sold to miners. The parties through whom the complainants derived their interests asserted a claim to the waters of the creek in November, 1864, and during that year commenced the construction of the ditches, and continued work thereon until August, 1866. The work was then suspended for want of means by the parties to continue it until the following year, when it was resumed; and in 1867 the ditches were completed and put into operation. Their cost was \$117,000. Whilst this work was progressing, and in the summer of 1865, there was some mining on the Ten-mile Creek, about fifteen miles above the point where the ditches of the plaintiffs tap the stream, but there was no continued mining at that place until 1867. From that period until the present time, the defendants had been working and were still working mining ground situated at that point on the creek. In that work, they in some places washed down the earth from the side of the hills bordering on the stream; in other places they excavated the earth, and threw such portions as were supposed to contain gold into sluices upon which the water was turned. The earth from the washing on the hill-sides and from the sluices, designated in the vocabulary of miners as "tailings," and the water mixed with it, was carried into the creek, and affected its whole current, which at that point has a volume of only about 200 inches, according to the measurement of miners, filling the water with mud, sand, and sediment, and impairing its value at that point for further mining.

The bill alleged that the "tailings" thus thrown into the current were carried down the stream into the ditches of the complainants, thereby obstructing the flow of the water through the ditches, and injuring it in quality and value; and they insisted that, as prior appropriators of the waters of the stream, they were entitled to its use without such deterioration; and, for the protection of their rights, they asked an in-

junction to restrain the defendants from the further commission of the alleged grievances.

The evidence showed that the volume of water in the creek, which at the point where the defendants worked their mining claims was, as above said, only about 200 inches, according to the measurement of miners, was increased at the point where the ditches of the complainants tapped the creek, by intervening tributary streams of clear water, to about 1,500 inches. Of this water, the Helena ditch diverted about 500 inches, and took it about eighteen miles to the places where it was sold to miners. The water, as it entered the ditch, was in some degree muddied and affected with sand, and the evidence was conflicting as to the influence of the mud and sand upon the value of the water. The great preponderance of the evidence, however, was to the effect that the injury in quality from this cause was so slight as not, in any material extent, to impair the value of the water for mining, nor render it less salable to the miners at the places where it was carried. A majority of the witnesses testified that it was first-class water for mining purposes, and some of them that it was good water even for domestic uses.

Persons who had cleaned out the Helena ditch, and examined it, testified that there were no tailings or sediment of consequence in it, and that the most that there was ran into the ditch from the hill-sides along the ditch and stream. A preponderance of the evidence also showed that no extra labor was required on the ditch on account of the muddy character of the water, or, at most, only the additional labor of one person for a few minutes each day, and that a sand-gate was necessary at the head of the ditch, whether or not there was mining above on the stream.

With respect to the water diverted by the Yaw-Yaw ditch, it was shown that its deterioration, so far as the deterioration exceeded that of the water in the Helena ditch, was caused by sand and sediment, brought by a tributary which entered the creek below the head of the Helena ditch.

The mining claims of the defendants were shown to be worth from \$15,000 to \$20,000 each, and it appeared that the defendants were responsible and capable of answering for any damages the complainants might sustain.

The district court denied the injunction, and the Supreme Court of the Territory affirmed its decree. From the latter court an appeal was taken to this court.

Mr. ROBERT LEECH, for the appellants.

Mr. G. G. SYMES, *contra*.

Mr. Justice FIELD delivered the opinion of the court.

By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law, declaratory of the rights of riparian owners, were at an early day after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection. By the common law, the riparian owner, on a stream not navigable, takes the land to the center of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate. And as all such owners on the same stream have an equality of right to the use of the water, as it naturally flows, in quality, and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for certain domestic, agricultural or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him. "It is wholly immaterial," says Mr. Justice STORY, in *Tyler v. Wilkinson*,¹ "whether the party be a pro-

¹ 4 Mason, 379.

prietor above or below in the course of the river. The right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to the proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all." "Every proprietor of lands on the banks of a river," says Kent, "has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat*. Though he may use the water, while it runs over his land, as an incident to the land, he can not unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he can not divert or diminish the quantity of the water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled doctrine on the subject, and all the difficulty which arises consists in the application": 3 Kent's Commentaries, 439, side paging. This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settle-

ment. And he who first connects his own labor with property thus situated, and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was, at an early period, recognized by legislation and enforced by the courts in those States and Territories. In *Irwin v. Phillips*, 5 Cal. 140, a case decided by the Supreme Court of California in January, 1855, this subject was considered. After stating that a system of rules had been permitted to grow up with respect to mining on the public lands by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region had been tacitly assented to by the Federal Government, and heartily encouraged by the expressed legislative policy of the State, the court said: "If there are, as must be admitted, many things connected with this system which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res adjudicata*. Among these, the most important are the rights of miners to be protected in their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold-diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that, without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers."

This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866. The act granting the right of way to ditch and canal owners over the public lands, and for other purposes, passed on the 26th of

July of that year, in its ninth section declares "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same": 14 Stats. at Large, 253. (R. S. § 2337.)

The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; that is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes; nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied.

Such was the purport of the ruling of the Supreme Court of California in *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143, where it was held that the first appropriator had only the right to insist that the water should be subject to his use and enjoyment to the extent of his original appropriation, and that its quality should not be impaired so as to defeat the purpose of that appropriation. To this extent, said the court, his rights go, and no farther; and that in subordination to them subsequent appropriators may use the channel and waters of the stream, and mingle with its waters other waters, and divert them as often as they choose; that, whilst enjoying his original rights the first appropriator had no cause of complaint. In the subsequent case of *Ortman v. Dixon*, 13 Cal. 33 (see, also, *Lobdell v. Simpson*, 2 Nev. 274), the same court held to the same purport, that the measure of the right of the first appropriator of the water, as to extent, follows the nature of the appropriation, or the uses for which it is taken.

What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator, will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant. (This is substantially the rule laid down in *Hill v. Smith*, 27 Cal. 483; Yale on Mining Claims and Water Rights, 194.) But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

If, now, we apply the principles thus stated to the present case, the question involved will be of easy solution. It appears from the evidence that there is, at the point where the defendants work their mining claims, only about two hundred inches of water in the creek, according to miners' measurement; that between that point and the point where the Helena ditch taps the creek the distance is about fifteen miles; and that between those points the creek is supplied by several tributary streams of clear water, so that, at the point where the water is diverted, its volume amounts to about 1,500 inches. Of this water, the Helena ditch diverts 500 inches, and conveys it nearly eighteen miles to the localities where it is sold. Running water has a tendency to clear itself, and that result is often produced by a flow of a few miles. But in this case the evidence shows that the water, as it enters the Helena ditch, is muddied, and to some extent is affected by sand. At the same time, there is a great pre-

ponderance in the evidence to the effect that the deterioration in quality from this circumstance is very slight, and does not render the water to any appreciable extent less useful or salable for mining purposes at the localities to which it is conveyed, and that no additional labor is required on the ditch on account of the muddied condition of the water. There is also much doubt left by the evidence, whether the sand carried into the ditch does not, to a very great extent, come from the hill-sides lying between it and the mining of the defendants, or lying along the course of the ditch. A sand-gate at the head of the ditch is necessary, whether there is or is not mining on the stream above; and the accumulation of sand from all sources, from the hill-sides as well as from the mining of the defendants, only requires the additional labor of one person for a few minutes each day. The injury thus sustained, and which is only to a limited extent attributable to the mining of the defendants, if at all, is hardly appreciable in comparison with the damage which would result to the defendants from the indefinite suspension of work on their valuable mining claims. The defendants are also responsible parties, capable, according to the evidence, of answering for any damages which their mining produces, if any, to the plaintiffs. Under these circumstances, we think there was no error in the refusal of the court below to interfere by injunction to restrain their operations and in leaving the plaintiffs to their remedy, if any, by an action at law.

With respect to the water diverted by the Yaw-Yaw ditch, it is shown that its deterioration, so far as the deterioration exceeds that of the water in the Helena ditch, is caused by sand and sediment brought by a tributary which enters the creek below the head of the Helena ditch.

Decree affirmed.

KELLY ET AL. V. THE NATOMA WATER AND MINING CO.

(6 Cal. 105. Supreme Court of California, 1856.)

Water rights—Test of priority. Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows.

Relation—Constructive possession. The appropriation of water can not be constructive. It can not rest in intention. Yet, if prosecuted in good faith, it relates back to the commencement of the improvements by which appropriation was made.

Dam. A dam across a natural water-course is an actual appropriation of the water at that point, but not below it, even though the water flowing over the dam has been brought into the water-course by ditches constructed by the owners of the dam.

Appeal from the District Court of the Twelfth Judicial District.

The defendants, the Natoma Water and Mining Co., commenced a canal, in 1852, to conduct water from a point on the South Fork of the American River, about twenty miles above Alder Creek, to supply the miners above and below that creek. In September, 1853, they purchased a dam, constructed a few months prior, on Alder Creek, and turned their water into the bed of the creek, above the dam. They had flumes, conducting the water from the dam to points lower down. In Alder Creek there is no running water from natural sources, except in times of freshet, though there are pools of water a part of the year. The defendants also built another dam for the same purpose, and constructed canals to conduct the water to miners lower down. The defendants had used natural water-courses, wherever practicable, down to this point, along the route of their works, and took up the water sold by them, after it was used, and conducted it by canals to lower points of their works, and re-sold it. There was an escape of water from the lower dam of defendants, and the plaintiffs subsequently, and in the month of October, 1853, built a dam, half a mile below that of defendants, and used the water thus escaping from defendants' dam. Prior to this, the defendants had charged certain

Chinamen for the use of the escape-water; and at the time plaintiffs commenced their dam, the defendants notified them that they should charge for the water, and had not abandoned it, and that they intended to erect other dams to collect it; but the defendants had not actually appropriated the bed of the creek below their dam. About May 1, 1854, the defendants erected another dam, about one hundred yards above the plaintiffs' dam, thereby cutting off the water used by plaintiffs. The plaintiffs brought their action for damages, and to restrain defendants. The case was tried by the court, who awarded the plaintiffs damages to the amount of \$648, being the value of the water cut off from plaintiffs, and entered a decree that defendants' last-erected dam be removed and abated. Defendants moved for a new trial, which was denied, and defendants appealed.

HAGGIN, CROCKER & ROBINSON, for appellants.

CLARK & GASS, for respondents.

The opinion of the court was delivered by Mr. Justice HEYDENFELDT. Mr. Chief Justice MURRAY and Mr. Justice TERRY concurred.

Possession, or actual appropriation, must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows.

Such appropriation can not be constructive, because there would be no rule to limit or control it, resting, as it must, only in intention. The principle, as laid down in *Eddy v. Simpson*, 3 Cal. R. 249, must govern this case.

The design of the defendants, two years before, to appropriate Alder Creek as a connecting link of their enterprise, could not give them exclusive rights until it was executed, because it is not the intention to possess, but the actual possession, which gives the right. And so in the case of *Stark v. Barnes*, 4 Cal. 412, cited by appellants, the doctrine of relation, as between the acts of the plaintiff, first and last, was simply applied to the thing possessed, and not to the intention of possessing.

The purchase, by the defendants, of Walker's dam, was an actual appropriation of the waters of the creek so far, but no further; and until they built a dam below, in order to make a further appropriation, any one else had the right to do so. If they had commenced first to build the dam in good faith, then, although their power of enjoyment would not commence until its completion, yet the right, as against others, would bear relation to the time of commencement; and this is all that the principle in *Stark v. Barnes* amounts to.

Judgment affirmed.

CONGER ET AL. V. WEAVER ET AL.

(6 California, 548. Supreme Court, 1856.)

Presumptions. One of the favorite doctrines of the common law is that of presumption. Presumptions may be indulged from lapse of time or other circumstances to settle disputes or to quiet possession.

Judicial notice. Every judge is bound to know the history and the leading traits which enter into the history of the country where he presides; such as, that his State has a large territory, that it is sparsely populated, that the bulk of the land belongs to the government, and that our citizens have appropriated the public domain for mining and other purposes.

Possession—Presumption of grant. The State of California has encouraged the appropriation of the public domain and has recognized the rights acquired thereby, which rights rest upon the presumption of a grant, or license from the owner.

Ditches and water rights. This presumption applies as well to ditches and flumes as to digging gold, and the right to appropriate water is a franchise which every one is licensed to attain from the State, provided the prior rights of others are not interrupted.

Possession of canal or flume. In the construction of a canal, the survey of the ground, planting of stakes along the line, and diligently pursuing the work is possession, and is conclusive of the right to the franchise.

Divergence from survey. The defendants having the right to erect their flume through the lot of plaintiffs, diverged a little from the original survey without injury to plaintiffs; *held*, no trespass and *damnum absque injuria*.

Appeal from the District Court of the County of Sierra,
Fourteenth Judicial District.

Action for trespass in building a flume across plaintiffs' saw-mill yard on the south branch of the Middle Fork of Yuba river, in Sierra county, and for damages.

Defendants deny the trespass and claim right of way across the saw-mill yard for the purpose of conveying water through their flume for mining purposes.

Both parties admit the title to the land to be in the government, but the evidence shows that plaintiffs surveyed the ground for a mill and yard in March, 1855, and that the mill was completed in July, 1855.

In November of the same year defendants began the construction of their flume across the land surveyed by plaintiffs, and included in their mill yard, which constitutes the alleged trespass.

Defendants proved that they commenced the survey for their ditch in July, 1853, and had prosecuted the work diligently ever since; that long before the plaintiffs' survey, the defendants had staked out the line of their ditch across the disputed premises, and within nine feet of the line on which the flume was constructed in November, 1855, and that plaintiffs had actual notice thereof while they were constructing their mill.

The alteration in the line of the ditch was made in July, 1855.

The court below instructed the jury that defendants had no right to change the line of the ditch so as to injure plaintiffs.

The court further ruled that if defendants located their ditch prior to plaintiffs' possession, and had posted notice thereof along the line and had since prosecuted the work diligently, they were entitled to a verdict.

The jury found for the defendants and judgment was entered on the verdict.

Motion for new trial made and overruled and plaintiffs appealed.

McCONNELL, for appellants.

DUNN & MEREDITH, for respondents.

Mr. Justice HEIDENFELDT delivered the opinion of the court. Mr. Justice TERRY concurred. Mr. Chief Justice MURRAY dissented.

It is admitted in the argument, on both sides, that the rights claimed by both parties are in and to the public lands, neither of them having title, except what arises from possession, or the claim of it.

In the decisions we have heretofore made upon the subject of private rights to the public domain, we have applied simply the rules of the common law. We have found that its principles have abundantly sufficed for the determination of all disputes which have come before us; and we claim that we have neither modified its rules, nor have we attempted to legislate upon any pretended ground of their insufficiency.

That new conditions and new facts may produce the novel application of a rule which has not been before applied, in like manner, does not make it any less the common law; for the latter is a system of grand principles, founded upon the mature and perfected reason of centuries. It would have but little claim to the admiration to which it is entitled, if it failed to adapt itself to any condition, however new, which may arise; and it would be singularly lame if it is impotent to determine the right of any dispute whatsoever. Having, as far as we have gone, met all difficulties by adhering to its doctrines, we have no ground to presume that we will have to go beyond its precincts for a solution of any which may arise.

One of the favorite and much indulged doctrines of the common law is the doctrine of presumption. Thus, for the purpose of settling men's differences, a presumption is often indulged, where the fact presumed can not have existed. In support of this position, I will refer to a few eminent authorities.

In *Eldridge v. Knott*, Cowper, 215, Lord MANSFIELD says: "Lord Coke says somewhere, that an Act of Parliament may be presumed, and of late it has been held that even in the case of the crown, which is not bound by the statutes, a grant may be presumed from great length of possession. It was so done in the case of the corporation of Hull & Horner; not that, in such cases, the court really thinks such a grant has been made, because it is not probable a grant should have existed without its being on record, but they presume the fact for the purpose, and from a principle, of quieting the possession."

See also *Goodtitle v. Baldwin*, 11 East. 488; and *Granger v. Scott*, 6 Man.

In these cases presumptions were indulged against the truth—presumptions of Acts of Parliament and grants from the crown. It is true, the basis of the presumption was length of time, but the reason of it was to settle the dispute and to quiet the possession. If, then, lapse of time requires a court to raise presumptions, other circumstances, which are equally potent and persuasive, must have the like effect for the purposes of the desired end; for lapse of time is but a circumstance, or fact, which calls out the principle, and is not the principle in itself.

Every judge is bound to know the history and the leading traits which enter into the history of the country where he presides. This we have held before, and it also is an admitted doctrine of the common law. We must, therefore, know that this State has a large territory; that upon its acquisition by the United States, from the sparseness of its population, but a small comparative proportion of its land had been granted to private individuals; that the great bulk of it was land of the government; that but little, as yet, has been acquired by individuals by purchase; that our citizens have gone upon the public lands continuously, from a period anterior to the organization of the State government to the present time; upon these lands they have dug for gold; excavated mineral rock; constructed ditches, flumes and canals for conducting water; built mills for sawing lumber and grinding corn; established farms for cultivating the earth; made settlements for the grazing of cattle; laid off towns and villages; felled trees; diverted water-courses; and, indeed, have done, in the various enterprises of life, all that is usual and necessary in a high condition of civilized development. All of these are open and notorious facts, charging with notice of them not only the courts who have to apply the law in reference to them, but also the government of the United States, which claims to be the proprietor of these lands; and the government of the State, within whose sovereign jurisdiction they exist.

In the face of these notorious facts, the government of the United States has not attempted to assert any right of ownership to any of the large body of lands within the mineral region of the State.

The State government has not only looked quiescently up-

on this universal appropriation of the public domain for all of these purposes, but has studiously encouraged them in some instances, and recognized them in all.

Now, can it be said with any propriety of reason or common sense, that the parties to these acts have acquired no rights? If they have acquired rights, these rights rest upon doctrine of presumption of a grant of right, arising either from the tacit assent of the sovereign, or from expressions of her will in the course of her general legislation, and, indeed, from both.

Possession gives title only by presumption; then, when the possession is shown to be of public land, why may not any one oust the possessor? Why can the latter protect his possession? Only upon the doctrine of presumption, for a license to occupy from the owner will be presumed.

In the case of *Hicks v. Bell*, 3 Cal. 219, speaking of this State's ownership of her gold mines, this court said: "In her legislation upon this subject, she has established the policy of permitting all who desire it to work her mines of gold and silver, with or without conditions."

Yet there was not at that time, nor has there been since, any act of the legislature directly conferring the privilege of working the mines, except in cases of foreigners, who were required to obtain and pay for a license to do so.

How, then, was the permission derived? The answer is evident. Her general legislation, looking at the existence of this state of things, and referring to it, necessarily presumed a license—a license to every one who chose to possess himself of the franchise.

Now, also, ever since the organization of the State, among the other various enterprises which have been undertaken upon the public lands, is that which is brought in question in the case before us—the construction of ditches, flumes and canals, for the purpose of conducting waters from their natural channels to supply the wants of gold miners.

In like manner, as in other pursuits, the State government has looked on the progress of these works for the past seven years, until their extent has reached hundreds of miles, and every important stream in the State has been tapped by them—has referred to them in various legislative acts, and has annually made them the subject of revenue to the State.

In *Irwin v. Phillips*, 5 Cal. 140, we canvassed the action and non-action of the State upon this subject, and derived from her course by the rule of presumption, a positive right in the constructors and owners of these works to hold and enjoy them as property—a vested right which can not be taken away.

In that and several subsequent cases we have recognized their right to appropriate the water, to divert it from its natural channel where no riparian rights intervened, and to be protected in its use in its pure and natural condition, against all subsequent efforts to divert or injure it.

This right, then, like that of digging gold, is a franchise; the attending circumstances raise the presumption of a general grant from the sovereign of this privilege, and every one who wishes to attain it has license from the State to do so, provided the prior rights of others are not interrupted.

But, from the nature of these works, it is evident that it requires time to complete them, and from their extent, in some instances, it would require much time; and the question now arises, at what point of time does the right commence, so as to protect the undertaker from the subsequent settlements or enterprises of other persons. If it does not commence until the canal is completed, then the license is valueless, for after nearly the whole work has been done, any one, actuated by malice or self-interest, may prevent its accomplishment; any small squatter settlement might effectually destroy it.

But I apprehend that, in granting the license which we have presumed for the purpose before us, the State did not intend that it should be turned into so vain a thing, but designed that it should be effectual for the object in view; and it consequently follows that the same rule must be applied here to protect this right as in any other.

Possession and acts of ownership are the usual indications of a right of property, and these must be judged according to the nature of the subject-matter.

One is in possession of an empty house who has the key of its door in his pocket; of a horse, when he is riding it; of cattle pasturing upon his grounds: so a miner, who has a few square feet for his mining claim which he can not directly occupy, has possession, because he works it, or because he has

staked it off to work it, if his acts show no intention to abandon; building a dam is taking possession of water as a usufruct.

So, in the case of constructing canals, under the license from the State, the survey of the ground, planting stakes along the line, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and forms a series of acts of ownership which must be conclusive of the right.

It is true, as is contended by the appellants, the defendants might have inclosed the ground which they needed for the digging of their canal, but inclosure was not necessary for the work; it would give them no higher rights, and it would have been no more notice than the plaintiffs already had received. *Lex non cogit ad vana* is another maxim of the common law.

But it is urged that in completing the canal or flume in question, the defendants diverged a little from their original surveyed line, at the point where it passed through the lot claimed by the plaintiffs, and that, therefore, this was an injury for which they were at least entitled to nominal damages. This position is not correct. Either line passed through the same lot. The defendants had the right to go upon the lot and erect their flume through it; there was, therefore, no trespass, and if the divergence was no actual injury to the plaintiffs, it was *damnum absque injuria*, and the court below properly instructed the jury on that point.

There are other assignments of error, but these we have already considered are conclusive of the merits of the case; and the others, even if well assigned, can have no effect in changing the result.

Judgment affirmed.

Mr. Chief Justice MURRAY—I dissent.

MAERIS ET AL. V. BICKNELL ET AL.

(7 California, 262. Supreme Court, 1857.)

The prior construction of a ditch for drainage purposes is not an appropriation of the water as against others who wish it for useful purposes ; but if at the time of such construction it was the intention to appropriate the water for useful purposes, and such intention was afterward carried out, then the appropriation dates from the construction of the ditch. .

A change in the use of water from one mining locality to another, by the extension of the ditch, or the construction of branches, would not affect the prior right of the appropriator.

Appeal from the District Court of Placer County, Eleventh Judicial District.

In 1851, plaintiffs' grantors cut a ditch from Main Ravine in Todd's Valley. In 1852, defendants' grantors cut two ditches from the same ravine and above plaintiffs' ditch. Plaintiffs brought suit to enjoin defendants from using the water of Main Ravine and from preventing its natural flow to plaintiffs' ditch.

Defendants claimed that plaintiffs' ditch was only designed to drain water from their mining claims and not to supply water for mining purposes, while defendants' ditches were designed to supply water for mining purposes and were so used, and on this ground they claimed a prior appropriation.

The evidence was conflicting and the lower court instructed the jury:

"That if they believed from the evidence that the Main Ravine ditch was constructed prior, in point of time, to the ditch or ditches of the defendants, and the waters of the ravine diverted thereby, it made no difference what the original intention in constructing it might have been, provided the use was not abandoned prior to the time that defendants' rights attached; and that plaintiffs did not lose their rights by varying the use from the original objects of the owners."

The defendants excepted to this instruction.

The jury found for plaintiffs. Thereupon the court rendered judgment for damages against defendants and perpetually enjoined them from using the water in dispute.

Defendants moved for a new trial which the court refused and defendants appealed.

SMITH & HARDY, for appellants.

HALE & HILLYER, for respondents.

BURNETT, J., delivered the opinion of the court—MURRAY, C. J., concurring.

Certain instructions were offered by defendants, which were not given by the court, but as no exception was taken, we can not notice the action of the court in this respect.

The first question that arises, and which is the most important one in this case, is whether diverting the water from its natural channel for the purpose of drainage simply, is such an appropriation of that element as to give the party a right as against others who wish to appropriate the water for useful purposes.¹

In the case of *Kelly v. The Natoma Water Co.*, 6 Cal. 105, this court held that "possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows."

From this decision, it follows that there must be an actual appropriation, and it would seem clear that such actual appropriation must be for some useful purpose allowed by law. In fact, merely turning the water from a claim with the intention to dispense with its use, is no actual appropriation at all. It also follows, from the same decision, that until such actual appropriation there can exist no complete right to the use of the water, for the party may never carry out his intention. But it was also held in that case, that if a party commenced first to construct a work in good faith, then, although his power of enjoyment would not commence until its completion, yet the right, as against others, would have relation to the time of commencement.

¹ Ante 592.

From these principles, it would seem legitimately to follow that if the ditch of plaintiffs was cut for the purposes of drainage simply, and not with the *bona fide* intention of appropriating the water thus diverted to some useful object, and the ditch or ditches of defendants were commenced first in good faith with the intent thus to appropriate the water, and before any actual appropriation by the plaintiffs or their grantors for mining purposes, then the defendants gained a priority over the grantors of plaintiffs, and over all persons holding under them.

Unless the grantors of plaintiffs had constructed their ditch with the intention of using the water for mining or other useful purposes, or after its construction they had actually so applied it, the defendants could not know that they ever would so apply it or intended so to apply it. If, at the time plaintiffs' ditch was made, such intention had existed and been avowed, and afterward carried out in good faith within a reasonable time, considering all the circumstances, then defendants could not, by any act of theirs, rightfully appropriate any water in the ravine, necessary to fill the ditch of plaintiffs according to its actual capacity at the date of the commencement of defendants' ditch or ditches.

From these principles, it follows that the mere prior construction of a ditch and diverting the waters of a stream will not give the party any priority over others. There must be an actual appropriation, or intention to appropriate, followed by due diligence.

The next question that arises in this case is, whether a party who makes a prior appropriation of water can change the place of its use, without losing that priority as against those whose rights have attached before the change. This question, we think, can admit of but one answer. It would seem clear that a mere change in the use of water, from one mining locality to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the prior right of the party. It would destroy the utility of such works were any other rule adopted. As to the question whether a party can change the use of the water from one purpose to another, without affecting his prior right, we express no opinion, as the point does not arise in this case.

The instruction given by the court below was not just to the defendants, because from its terms it did not place the claims of the parties upon the proper grounds, nor state clearly the distinctions necessary to give the jury a correct idea of their duty under the evidence given in the case. For this reason, the judgment must be reversed, and the cause remanded for further proceedings.

CRANDALL ET AL. V. WOODS ET AL.

(8 California, 136. Supreme Court, 1857.)

Water rights. The appropriator of public lands belonging to the government is entitled to the use of streams and water-courses naturally flowing through such lands, as against persons subsequently appropriating and using the water of such streams.

Prescription. To acquire title by prescription, it is necessary that the period of enjoyment should equal the time fixed by the statute of limitations as a bar to an entry on land, which in California is five years.

Appeal from the District Court of the County of Nevada, Fourteenth Judicial District.

Action by the Union Water Company against Woods and wife and Andrew Jamieson, for damages for the diversion of water, and praying for a perpetual injunction.

Woods disclaimed, but Jamieson claimed a right to the water.

The following are the facts: Woods was in 1850 in possession of a tract of government land containing several springs of running water, which united and formed a stream which ran through an adjoining tract where in 1851 it was used for irrigation and other natural purposes. In 1852 Woods sold to the Water Company, which immediately constructed water works and used the water of the stream to supply the town of Grass Valley.

In 1856 Jamieson claimed and exercised the right to use the water for natural purposes and supported his claim by showing a chain of title to the tract irrigated by the stream in 1851.

The case was tried by a jury, whom Jamieson asked the court to instruct as follows, which being refused an exception was taken. "If the jury believe, from the evidence, that the defendant, Andrew Jamieson, or those under whom he holds, located the ranch, or piece or parcel of ground, prior to the claim set up by the plaintiffs to the waters of the spring in question, and that the water of said springs, by its natural flow, found its way into defendant Jamieson's said ranch, then that said Jamieson was entitled to the reasonable use of said water, and to have the same flow through his ranch for agricultural and farming purposes, as against the plaintiffs, subsequently diverting the same for culinary and domestic purposes." The jury returned a verdict in favor of the plaintiff, on which judgment was rendered and defendants appealed.

McCONNELL & STEWART, for appellant.

A. B. DIBBLE, for respondents.

MURRAY, C. J., delivered the opinion of the court—BURNETT, J., concurring.

The only question involved in this case is, whether a party who locates upon and appropriates public lands belonging to the United States, is entitled to the use of streams and water-courses naturally flowing through such lands as against persons subsequently appropriating and using the waters of said streams. By the common law, the proprietor of lands upon the banks of a water-course owns to the middle of the stream, and the proprietor of the lands through which the stream flows is held to be the owner of the bed of the stream, and entitled to the use of the water which flows over his land.

The property in the water, by reason of riparian ownership, is in the nature of a usufruct, and consists in general not so much in the fluid as in the advantage of its impetus. This, however, must depend in a great measure upon the natural as well as the artificial wants of each particular country. The rule is well settled that water flows in its natural channels, and should be permitted thus to flow, so that all through whose lands it passes may enjoy the privilege of using it. A riparian

proprietor, while he has the undoubted right to use the water flowing over his land, must so use it as to do the least possible harm to other riparian proprietors.

The uses to which water may be appropriated are: 1st, To supply natural wants, such as to quench thirst, to water cattle, for household and culinary purposes, and, in some countries, for the purposes of irrigation. These must be first supplied, before the water can be applied to the satisfaction of artificial wants, such as mills, manufactories, and the like, which are not indispensable to man's existence. Water is regarded as an incident to the soil, the use of which passes with the ownership thereof. As a general rule, a property in water can not be acquired by appropriation, but only by grant or prescription.

Having thus stated the fundamental principles upon which this right is founded, it is evident that the only difficulty in this case arises, first, from the fact that the defendant is not the owner in fee of the land, but that the title to it is in the government of the United States; and second, the necessity of laying down some rule consistent with our former decisions, and the policy of the State, which has been to protect mining interests and improvements as far as possible.

In *Irwin v. Phillips*,¹ which is the leading case upon the subject of the appropriation of water, it was admitted that the lands upon which the mining claims were situated, and through which the water ditch was located, were government lands, and that the mining claims were located after the water had been appropriated.

In delivering the opinion of the court, Mr. Justice HEYDENFELDT remarks: "It is insisted by the appellants that, in this case, the common law doctrine must be invoked, which prescribes that a water-course must be allowed to flow in its natural channel. But upon an examination of the authorities which support that doctrine, it will be found to rest upon the fact of the individual rights of landed proprietors upon the stream, the principle being, both at the civil and common law, that the owner of lands on the banks of a water-course owns to the middle of the stream, and has the right, in virtue of his proprietorship, to the use of the water in its pure and

¹5 Cal 140, *Post* WATER.

natural condition. In this case, the lands are the property either of the State or of the United States, and it is not necessary to decide to which they belong for the purposes of this case. It is certain that, at the common law, the diversion of water-courses could only be complained of by riparian owners, who were deprived of the use, or those claiming directly under them. Can the appellants assert their present claim as tenants at will? To solve this question it must be kept in mind that their tenancy is of their own creation, their tenements of their own selection, and subsequent, in point of time, to the diversion of the stream. They had the right to mine where they pleased through an extensive region, and they selected the bank of a stream, from which the water had been already turned, for the purpose of supplying the mines at another point."

Since this decision, a special property has been recognized in water, not in the sense in which the word property is ordinarily used, but the courts have held, that a right to water as a usufruct, may be acquired by appropriation, as against a subsequent appropriator, who shows no title to the soil; and that by the appropriation of water, and the construction of a canal, the party acquires an easement or franchise, which he may enjoy and protect. If this is an innovation upon the old rules of law upon this subject, it is such a one as the peculiar circumstances of the country, and the immense importance of our mining interest will justify.

In the case of *Starr v. Child*, 20 Wend. 149, Judge BRONSON, in speaking of the obligation of American courts to follow the rules of common law, as laid down by the courts of England, uses the following strong language:

"Although the ebb and flow of the tide furnishes an imperfect standard for determining what rivers are navigable, it nevertheless approximates to the truth, and may answer very well in the island of Great Britain, for which the rule was made. But such a standard is quite wide of the mark when applied to the great fresh-water rivers of this continent, and would never have been thought of here if we had not found the rule ready made to our hands. Now, I think no doctrine better settled, than that such portions of the law of England as are not adapted to our condition, form no part of the law of

this State. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as are framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason, to a case where that reason utterly fails. *Cessante ratione legis cessat ipsa lex.*"

To proceed, however, with the case before us. If the rule laid down in *Irwin v. Phillips*, 5 Cal. 146, is correct as to the location of mining claims and water ditches, for mining purposes, and priority is to determine the rights of the respective parties, it is difficult to see why the rule should not apply to all other cases where land or water had been appropriated. The simple question was, that as between persons appropriating the same land, or land and water both, as the case might be, that the subsequent appropriator takes, subject to the rights of the former.

But an appropriation of land carries with it the water on the land, or a usufruct in the water, for in such cases the party does not appropriate the water, but the land covered with water. If the owners of the mining claim, in the case of *Irwin v. Phillips*, had first located along the bed of the stream, they would have been entitled, as riparian proprietors, to the free and uninterrupted use of the water, without any other or direct act of appropriation of the water, as contradistinguished from the soil. If such is the case, why would not the defendant, who has appropriated land over which a natural stream flowed, be held to have appropriated the water of such stream, as an incident to the soil, as against those who subsequently attempt to divert it from its natural channels for their own purposes.

One who locates upon public lands with a view of appropriating them to his own use, becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired. He may admit that he is not the owner in fee, but his possession will be sufficient to protect him as against trespassers. If he admits, however, that he is not the owner of the soil, and that the fact is established that he acquired his

rights subsequent to those of others, then, as both rest alike for their foundation upon appropriation, the subsequent locator must take subject to the rights of the former, and the rule, *qui prior est in tempore, potior est in jure*, must apply.

Let us examine the effect of such a rule for a moment, and see if the consequences which the respondent predicts, viz., the destruction of the use and value of ditch property in the mines, will necessarily flow from it. A has located mining-claims along the bed of a stream, before any water-ditch or flume has been constructed; will any one doubt that he should have the free use of the water, as against subsequent locators of either mining claims or canals? Or, suppose he had located a farm, and the water passing through his land was necessary for the purposes of irrigation; is not this purpose just as legitimate as using the water for mining? It may or may not be equally as profitable, but irrigation for agricultural purposes is sometimes necessary to supply natural wants, while gold is not a natural, but an artificial want, or a mere stimulant to trade and commerce.

It is understood, that the location of land carries with it all the incidents belonging to the soil. Those who construct water-ditches will do so with reference to the appropriations of the public domain that have been previously made, and the rights that have been already acquired, with a full knowledge of their own rights as against subsequent locators.

In the case before us, the plaintiffs are not the proprietors of a ditch constructed for mining purposes (although we have endeavored to show that this would make no difference). They claim that they purchased the privilege of the water from one Woods, and conducted the same by means of pipes, etc., to the town of Grass Valley, for the use of the inhabitants. The water in dispute had its source in natural springs rising upon the ranch or farm of Woods, who located the land in 1850. In 1851, the ranch of the defendant which was contiguous to that of Woods, was located, and the water flowed by natural channels upon it. Woods sold the privilege of diverting the water to the Union Water Company in 1852. At the time of this sale the rights of the defendants had accrued. Woods had no power of disposition over the water; he could use it for the purpose of supplying the wants

of himself and his stock; and if there was sufficient, might, without interfering with the rights of those below him, have used a portion for the purposes of irrigation; but he had no right to divert it from its natural channel, or prevent it from flowing upon the lands of the defendants: *Evans v. Merriweather*, 4 Ill. 492; and *Arnold v. Foot*, 12 Wend. 330.

It does not appear, from the evidence in this case, that the water would have flowed through the town of Grass Valley, or that it was the only water which could be obtained for the purpose of supplying the town; neither does it appear that the amount used by defendant for irrigation was so large as to materially diminish the quantity, or render the supply inadequate to the wants of the inhabitants of the town.

The plaintiffs declare as a company, and count upon their appropriation, and not upon their rights as riparian proprietors. This relieves the case of the question, whether, granting the defendant had a right to use the water to supply his natural wants, he could use it for the purpose of irrigating his land?

It is urged by the respondents that they have acquired a right to the use of the stream in question by adverse enjoyment or prescription. To acquire a title in this manner, it is necessary that the enjoyment or prescription should have continued for a period corresponding to the time fixed by the statute of limitations as a bar to an entry on land. The period fixed by our statute is five years; the plaintiff's possession has continued but four, so that his right has not yet become complete.

Judgment reversed, and cause remanded.

THOMPSON ET AL. V. LEE ET AL.

(8 California, 276. Supreme Court, 1857.)

Pleading and practice. An answer which is not responsive to the complaint makes no issue. When the complaint which is not denied makes out a *prima facie* case, the burden is upon the defense to sustain their affirmative allegations.

Location notice. A notice is evidence of possession, but of itself, alone, is not sufficient. Taken with other acts, it amounts to sufficient evidence. It forms one of a series of acts, which, taken together, make the right perfect.

Appeal from the District Court of Sierra County, Fourteenth Judicial District.

Action for damages for the wrongful diversion of the waters of Slate Creek, with prayer for injunction restraining the defendants from using the water.

Verdict and judgment for plaintiffs and injunction awarded. Defendants appeal.

The opinion states the case.

DUNN & MEREDITH, for appellants.

G. N. SWEZY, for respondents.

BURNETT, J., delivered the opinion of the court—TERRY, C. J., concurring.

The complaint alleges in substance, that in March, 1852, Higgins and Smith posted a notice on North Slate Creek, claiming the waters of the stream, and of all ravines that might be crossed by a ditch from that point to Gibsonville, where the water was to be used for mining purposes; that surveys were made, and the ditch partly dug by the parties through whom the plaintiffs claim, and that the ditch was finally finished by plaintiffs; that the predecessors of plaintiffs had appropriated the waters of "Third Ravine," a ravine crossed by the ditch, and that the defendants had wrongfully diverted the waters of the north branch of North Slate Creek, and also of Third Ravine from plaintiffs' ditch. The defendants in their answer deny that plaintiffs posted the notice, or made the surveys as alleged. They also deny in general terms, that plaintiffs by any act of theirs ever acquired any right to the waters of the north branch of North Slate Creek, and affirm that the right to the use of the water of said branch is in them. They also deny that they ever diverted the waters of Third Ravine from the ditch of plaintiffs. The complaint and answer were both verified.

The object of the plaintiffs in setting out the facts of their case in detail, was doubtless to avoid the expense and trouble of proving specific facts, which the defendants could not specifically deny. The only material issue made by the specific denials of the answer, is that concerning the diversion of the waters of Third Ravine. The denial that plaintiffs posted the notice and made the surveys amounted to nothing for the reason that no affirmative allegation to that effect had been made in the complaint. The answer was not responsive to the allegations of the complaint in these particulars, and made no issue. See the case of *Dewey v. Bowman*, 8 Cal. 145.

All the material allegations of the complaint which were not denied in the answer, were admitted as true. And as the verdict of the jury was for the plaintiffs, and no motion was made for a new trial, the only errors assigned have reference to the action of the court in refusing certain instructions offered by the defendants, and in giving others in lieu of them.

The defendants offered, in all, eleven instructions, the third and fourth of which were given, and the others refused. The instructions refused by the court, except the fifth, were not admissible under the pleadings. The plaintiffs having alleged certain specific facts, which taken together made out a *prima facie* case, as to their right to the waters of Slate Creek, and these facts not being denied, the *onus* of the proof was thrown upon the defendants, to sustain their affirmative allegations, that they were the first appropriators of the waters of the north branch of the stream.

The court very properly instructed the jury that there were but two issues of any great importance. First, as to whether or not defendants had diverted the waters of Third Ravine from plaintiffs' ditch; and second, as to the priority of location and appropriation of the waters of the north fork of Slate Creek.

The fifth instruction offered by the defendants and refused by the court was this: "A notice is a mere declaration of intention to possess, but not evidence of possession." This instruction was not correct, as offered. A notice is evidence of possession, but of itself, alone, is not sufficient. Taken with

other acts, it amounts to sufficient evidence. It forms one of a series of acts, which, taken together, make the right perfect: *Conger v. Weaver*, 6 Cal. 548.

As to the instructions given by the court, there would seem to be no error. Under the state of the pleadings there was very little for the jury to try. We can see no error in the judgment of the court below, and the same is therefore affirmed.

MARTIN & DAVIS V. BROWNER ET AL.

(11 California, 12. Supreme Court, 1858.)

Town lots on mineral lands. A person can not, under the pretense of a town lot, locate and hold a large tract of mining land in the mineral region of this State, as against persons who enter in good faith for the purpose of digging gold therein.

Appeal from the District Court of Nevada County, Fourteenth Judicial District.

Defendants obtained a judgment from which plaintiffs appealed.

The opinion states the case.

FRANCIS J. DUNN, for appellants.

McCONNELL & NILES, for respondents.

BALDWIN, J., delivered the opinion of the court—TERRY, C. J., and FIELD, J., concurring.

Waiving the serious question whether this appeal is properly before us for want of a statement of facts, so far as the errors assigned by appellants are concerned, we think their case is without merit. The action was ejectment for a portion of a lot of about twelve acres in a small mining town. The plaintiffs claimed to have title to it, by having taken posses-

sion and enclosing it, it being public land. It seems that the site of this village, including a portion of this lot sued for, was mining land, and parts of it had been worked as such before plaintiffs' inclosure. The defendants entered upon and were using a portion of this lot for mining purposes, but this portion was not contiguous to the buildings or the ground immediately about the buildings of the plaintiffs; nor was the use of this portion by defendants shown to injure or in any way conflict with the comfortable use of the premises by plaintiffs as a residence, or for the carrying on of any mechanical or commercial business. At most, it could only interfere with them in cultivating the soil. The court instructed the jury, in effect, that a person can not, under the pretense of a town lot, locate and hold a large tract of mining land in the mineral region of this State, as against persons who enter in good faith for the purpose of digging gold therein; that, while a person might be entitled to hold a town lot by location or purchase, as against miners, such lot must be so holden in good faith and for that purpose; and that one can not, under the mere pretext of a town lot, hold a large portion of land for agricultural purposes as against the claim of the miner.

We think the law was correctly put to the jury on this state of facts. It is apparent that, if under pretense of holding land in exclusive occupancy as a town lot, a party can take up twelve acres of mineral land in the mining district, which, before his appropriation, was used and is mainly valuable for mining purposes, and hold it as owner, he may take up twice or four times that quantity; and the consequence would be that all of the mineral lands in a neighborhood might be appropriated by a few persons, by their making a village or hamlet on or near the land so appropriated. This would be to destroy to a great extent, if not entirely, the principle held by this court in *McClintock v. Bryden*, 5 Cal. 97, and *Stoakes v. Barrett*, 5 Cal. 36, which we have no desire to disturb.

We limit our decision as a precedent to the facts of this particular case, as it is impossible to prescribe a rule in such cases which must be of universal application. All that we

deem it necessary now to hold is, that the facts of *this* case do not exempt it from the rule in the case of *McClintock v. Bryden*, 5 Cal. 97.

Judgment affirmed.

KIMBALL ET AL. V. GEARHART ET AL.

(12 California, 28. Supreme Court, 1859.)

Witness. To make the testimony of a witness admissible, he must have been competent at the time of the taking of his deposition. It is of no importance that he is competent afterward, as it is the effect of the interest on the witness which disqualifies him.

Water—Previous right of action. The conveyance of a water claim does not transfer the right of action for damages for the past illegal use of the water.

Ditch—Due diligence—Local considerations. The pecuniary inability of parties projecting a ditch is not an excuse for failure to complete it in a reasonable time. In determining the question of diligence in the construction of a ditch the jury may rightfully consider the circumstances surrounding the parties at the date of appropriation, such as the nature of the climate and country, as well as the difficulty of procuring labor and materials.

Appeal—Weight of evidence. The appellate court will not interfere with the verdict of a jury on the ground that it is against the weight of evidence, except in extraordinary cases.

Location of ditch—Relation. Where parties projecting a ditch give notice in the usual manner, designate the line of the ditch by the usual marks, and prosecute work with reasonable diligence until the same is ready to receive water, they are entitled to such water as against all intervening or subsequent claimants. The title to water conveyed through a ditch constructed in the usual manner, and completed with reasonable diligence, relates, on completion, to the first act of appropriation.

Priority in appropriation—Notice. Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent on the ownership of the land through which the water flows. The notice of intention to appropriate water must be sufficient to put a prudent man upon inquiry.

Evidence—Diversion of water. Where parties go to issue in actions for the diversion of water, upon general averments and denials of title, anything that legally attacks or supports the respective titles is admissible in evidence.

Appeal from the District Court of Sierra County, Fourteenth Judicial District.

This was an action for damages for the diversion of water from the ditch of plaintiffs.

The facts are stated in the opinion of the court, with the exception of certain instructions which were given by the court to the jury. The instructions given by the court, at the request of the plaintiffs, are as follows:

"1. If the jury believe that the plaintiffs did, in July, 1854, project a ditch to receive the water now in dispute, and did give notice to the world of their intention to dig such ditch and appropriate such water, in the usual manner, and did mark out and designate the line of said ditch by the usual marks and indications, and did pursue their work on said ditch with a reasonable degree of diligence until the same was completed so as to receive this water in dispute, then they are entitled to such water before all persons subsequently claiming or locating it.

"2. If the jury believe, from the evidence and the admissions contained in the answer, that the plaintiffs took up and claimed the water in dispute before the defendants did, and that they constructed a ditch to receive such water, with due diligence, and that since the completion of said ditch they have been deprived of such water by the defendants, and since the thirty-first of July, 1856, the plaintiffs have had their ditch in a condition to, and could have used the water in the water season prior to the commencement of this suit, and have, during such time, been deprived of the use thereof by the defendants, then they must find for the plaintiffs and assess the damages.

"3. In appropriating unclaimed water on public lands, only such acts are necessary, and only such indications and evidences of appropriation are required as the nature of the case and the face of the country will admit of, and are under the circumstances and at the time practicable; and surveys, notices, stakes and blazing of trees, followed by work and actual labor, without any abandonment, will in every case where the work is completed, give title to water over subsequent claimants.

"4. If the plaintiffs surveyed the ground, planted stakes along the line, gave public notice by posting notices, or otherwise, and actually commenced and diligently pursued the work of the Yuba River Ditch, which was to take and receive the water in dispute, and if any of these acts were prior to the claim or location of defendants, this entitled plaintiffs to the possession and ownership of the water, and therefore the jury must find for plaintiffs.

"5. If the jury believe that the plaintiffs, with the intention to appropriate this water, used reasonable diligence in following one step by another till the ditch was completed, their title to the water, though it was not perfected until the ditch was so far completed as to convey the water, will, yet, on completion, date from the beginning of the work.

"6. That in determining the question of the plaintiffs' diligence in the construction of their ditch, the jury have a right to take into consideration the circumstances surrounding them at the date of their alleged appropriation, such as the nature and climate of the country traversed by said ditch, together with all the difficulties of procuring labor and materials necessary in such cases.

"7. The law does not require a vain or useless thing to be done; that therefore the plaintiffs were not required by the law of due diligence to complete their ditch before they could successfully use it for the purpose for which they dug it.

"8. If the tunnel through the ridge was a necessary part of the plaintiffs' ditch, without which it could not be used, then it was only necessary for the said plaintiffs to complete their said ditch by the time they could, with reasonable diligence, succeed in preparing their tunnel for use."

To the giving of the foregoing instructions the defendants excepted.

The following are the instructions given at the request of the defendants:

"1. If the jury believe from the evidence that the plaintiffs had no ditch or survey for a ditch to the stream of water in dispute, and also that they had no notice or marks upon said stream, indicating an intention to appropriate it, at the time of defendants' appropriation of the water of the said stream, they must find for the defendants.

"2. Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are dependent upon the ownership of the land through which the water flows.

"3. The mere act of commencing a ditch with the intention of appropriating the water of a stream, is not sufficient of itself to give a party any exclusive right to the water of such stream.

"4. Although plaintiffs or their grantors may have intended to appropriate the water in dispute, by means of their ditch commenced in 1854, yet, if they did not manifest their intention by such acts or in such a manner as would have notified a prudent man, about to appropriate said water of such intention at the time defendants appropriated the same, the jury must find for the defendants.

"5. The doctrine of relation in the appropriation of water, can only apply when the first acts, from which the party appropriating seeks to date his right, indicate the intention of appropriating such water.

"6. If the jury believe from the evidence, that plaintiffs or their predecessors in interest, did not, after locating and surveying their ditch, prosecute the work on it in good faith, and as fast as the nature of the work and the state of the weather would reasonably permit, and that they had neglected the work upon it for an unreasonable length of time, immediately preceding the appropriation of the water in dispute by defendants, the verdict should be for the defendants.

"7. If the jury believe from the evidence, that the plaintiffs at the time they commenced the Yuba River Ditch, had not the pecuniary means requisite to complete the same in a reasonable time, and that they projected the said work, and claimed the water in dispute with a full knowledge of their said pecuniary inability to complete the same within a reasonable time, then plaintiffs can not urge such want of pecuniary means as an excuse for not prosecuting said work with reasonable diligence, and completing it within a reasonable time.

"8. If the jury believe from the evidence, that the plaintiffs made an unreasonable delay after claiming the water in dispute, and that during such delay, and before the plaintiffs renewed work upon their ditch, defendants in good faith

located and appropriated the water in dispute, they must find for the defendants.

"9. If the jury believe from the evidence, that the defendants were the first appropriators of the water in dispute, in good faith, and without notice of any prior claim of plaintiffs, they must find for defendants.

"10. Even if the plaintiffs had located and claimed the water in dispute, in the year 1854, and prior to the appropriation of the same by the defendants, yet, if after making such location and claim, plaintiffs failed and neglected to renew or keep in existence such notice or such other evidence of their location and claim, as would have put a reasonable and prudent man, wishing to appropriate the water, on inquiry, and that in the absence of such notices or other evidences of said location or claim, the defendants located and appropriated said water in good faith for mining purposes, they must find for the defendants.

"11. Kimball and others are plaintiffs in this action, and they must show a better title to the water in dispute than the defendants have, before they can recover, and the burden of proof is on the plaintiffs to show that they are entitled to the water in dispute."

To the giving of which instructions so requested by the defendants, the plaintiffs excepted. The substance of the instructions refused by the court appear in the opinion of the court. Defendants had verdict and judgment.

Plaintiffs moved for a new trial, which was denied, and they appealed to this court.

McCONNELL & NILES and H. L. THORNTON, JR., for appellants.

VANCLIEF & STEWART, for respondent.

BALDWIN, J., delivered the opinion of the court—TERRY, C. J., concurring.

This is an action for the diversion of water, and the main question was the privity of appropriation. On the trial the plaintiffs offered one Howe as a witness. He was sworn on his *voir dire*, and upon the facts stated by him on his exami-

nation, was objected to as incompetent because interested, and excluded by the court. The correctness of this ruling is impeached by the appellants, and is the first error assigned. The facts which determine this question of the interest of the witness are these: Witness was, in 1854, an owner in the Yuba Ditch Company, in respect to the water of which this suit is—in 1854 till 1856—was also an owner in a ditch called the Kimball Ditch, from July, 1853, till August, 1854; sold his interest in the Yuba River Ditch Company to Harlow Kimball; the witness' interest in the Kimball Ditch was sold by the sheriff; sold interest in the Yuba Ditch Company in July, 1856; latter part of it; don't know exactly the date. Being asked as to the extent of his interest in the Yuba Ditch, the witness stated: "We were partners, and took up the water; I owned one-half of it then; that was what I supposed when we took it up; I sold my whole right then; I could not tell how much I did own, for I never had paid a cent on it." "There was a dispute about the water of the Yuba Ditch, or a part of it, when witness sold; made a deed to Kimball when he sold it; was paid for it; was paid by note about first of April, 1858, between first and fifteenth; took no mortgage or other security." Being asked how he came to settle and take the note just before the trial in this suit, in April, 1858, answered: "I was not able to go on with it, and I told them if they would pay me seven dollars per day I would take it and release them, and have no claim on the ditch; bargain made with Harlow Kimball; the note given, witness supposes, was to enable him to testify; Kimball, Johnson, and Hickok, gave their notes; Kimball sold to Johnson and Hickok two-fifths interests the day witness sold to them; never had a settlement from the commencement of the ditch; they were owing witness \$1,000; claimed to hold the ditch for his debt—for work on it; never been paid a dollar; Kimball and Hickok told me to bring in account, and they would settle it." On cross-examination, witness said: "In April, 1858, was not interested then or after the deed was made. No other interest than the claim for this money; no mortgage or other security for this money; the deed of the Yuba Ditch Company to Kimball was made for the purpose of Kimball's transferring a portion of witness' interest to Johnson and Hickok

for heavy indebtedness due from witness and Kimball as owners of the Yuba River Ditch. Kimball, at the time witness transferred to him, transferred two-fifths of this ditch to Johnson and Hickok, and they canceled all the indebtedness due from witness and Kimball; sold all his (witness') right, because witness was in debt on it, and could not go on with it"—“was it understood that both were to be responsible for debts? Thinks things got were charged to Kimball. Witness never paid anything; Kimball paid all that was paid; witness had run behind all the time. When we first took the ditch my share was one-half, and when it ran behind I never could exactly know what it was; deeded to Kimball one-half; did it to cover the greatest interest witness ever had; the deed to Kimball and from Johnson and Hickok all parts of the same transaction; so understood to be beforehand; was to give witness seven dollars a day for all the work witness had done from the commencement, and to assume the debts.”

The deposition of the witness was taken, and tended to prove facts material to the issue in support of the plaintiffs' action. This deposition being offered by the plaintiffs, was objected to by the defendants upon the showing made on the *voir dire*, and also for another reason, which it is not necessary to consider, as it is embraced in the answer of the witness. The plaintiffs offered in rebuttal an entry made in this case at the April Term, 1858, to this effect: “On motion of plaintiffs' attorneys it is ordered, that plaintiffs have leave to strike from their complaint their claim for damages previous to July 19th, 1856—the date of Howe's deed to Kimball.” But no amendment to the complaint in this respect seems to have been made. The plaintiffs also offered a paper in these words: “The plaintiffs in the above entitled cause release and remit to the defendants in said cause all claim and demand for damages contained in their complaint for the whole of the month of July up to the first day of August, A. D. 1856.

(Signed) KIMBALL & Co.

By their Attorneys, H. I. THORNTON, Jr., and J. R. McCONNELL.”
And filed it among the papers in the cause.

The declaration is for damages for the diversion of water for 1855 and succeeding years.

It is unnecessary to consider these matters subsequent to

the taking of the deposition which was introduced to give it effect. The mere order permitting an amendment of the complaint was of no effect unless and until complied with. The release or remittitur was of no force, even if the attorneys at law signing it had any legal authority to execute it, which, to say the least, is extremely questionable—for the plain reason, that to make the testimony of the witness admissible, he must have been competent at the time of the taking of his deposition. It is of no importance that he is competent afterward, as it is the effect of the interest on the witness which disqualifies him. Whether he was interested or not depends on the issue—that issue, in this case, upon the pleadings, was the title to damages arising from a diversion of water before 1856; and this question, of course, depended upon the ownership of the water, such ownership following from the fact of prior appropriation. The question of interest then rests on this—would the witness have gained or lost by the verdict? It seems that he and Kimball were joint owners before the date of the deed to Kimball, in July, 1856. For an injury to or an appropriation of the common property, while they were such joint owners, *these owners* were entitled to damages. If a recovery had been had by one, the benefit would have resulted to both. The partner or tenant in common would have held these damages in trust for both, just as if the defendants had voluntarily paid the amount of these damages to one of these owners. The sum so paid would have been the property of both. The subsequent deed to Kimball, though it carried the property and the future use of the water, did not retroact and carry the right to damages for the past illegal use of it, any more than a deed to land carries the remedies for past trespasses. An ingenious argument is made by the appellants' counsel to show that by the failure of Howe to pay his proportion of expenses, the estate he had was forfeited as on a condition subsequently broken, and that all remedies and rights touching the estate, by relation, attach to the other party. We are unable to see the force of the argument. It is equally unfounded in law and in fact, for here there was no original, independent estate in Kimball; he made no deed or contract on condition subsequent. If not estopped by the

deed from Howe to deny Howe's title, the facts sufficiently show, notwithstanding his not very satisfactory explanations, that Kimball and Howe were partners in this adventure, with equal rights in the subject of it, and it is evident that the mere failure of one partner to pay his proportion of expenses, or of the debts of the concern, does not forfeit his rights in the common property. We think, in the aspect in which this witness presented himself, it is the case of one partner suing for an injury done to the firm property, and calling the other as a witness to prove his case.

The argument founded upon the peculiar nature of this property is more subtle than sound. It is true that the mere right to water is a sort of incorporeal thing; but the water itself is substantial and tangible, and as the right gives the control and possession of this commodity, and entitles the party to damages for its diversion by another, we do not see why this right may not be acquired by two or more acting together, or why, when they do acquire it, they do not hold it as other property, and may not sue as such for any unlawful interference with it.

The court, therefore, did not err in excluding this deposition. Nor do we see in the statement of this witness, when properly construed, any evidence of abandonment. Howe and Kimball acquired this property as partners; for a sufficient consideration, one relinquishes to the other his interest in the joint property. The nature of the property has no effect on the transaction. It is the common case of a bargain and sale by one partner to another, none the less partaking of the nature of a bargain and sale, because the selling partner was indebted to his associate on account of the firm business, and, for this purpose, makes the sale.

The next question is, whether the verdict is so clearly against the weight of evidence that we are called upon to reverse the judgment of the district court before whom it was given, and grant a new trial? This court has so frequently held that it would only interfere in extraordinary cases with the decisions of the lower courts in this respect, that it is useless to repeat the rule laid down. It is almost impossible for an appellate court to satisfy itself in a decision upon such matters—so much depends upon the manner, bearing, charac-

ter of witnesses, and the peculiar circumstances which the transcript fails to preserve, which give value and weight to testimony.

The main question was as to the priority of location of this ditch, and this depended very much upon the general fact whether the plaintiffs had done such acts in 1854 as would, in August, 1855, when they completed their ditch to the water in dispute, entitle them to invoke the doctrine of relation, and get in, in advance of the actual appropriation of the water by the defendants; and upon this question there was no little conflict in the proofs. The conflict is in respect to the dates and character of the particular acts from which the appropriation is inferred. If there were no other circumstances of conflict than those contained in the testimony of James as to the time of marking the trees, this would, perhaps, be sufficient to be left to the jury for them to determine the weight and effect of the proofs. But there are various other matters of more or less weight, such as the admissions of Howe and the like.

The points made by the appellants question the propriety of certain instructions given, and of the refusal of other instructions asked.

A large number of instructions were given by the court, and several refused. Those given are expressed with great clearness and precision. They embody the law as ruled by this court, and propositions necessarily resulting from those settled heretofore. Several instructions were refused by the court. They are marked seven, eight, and nine of the list of those asked for by the plaintiffs. The seventh instruction was to this effect: That if the plaintiffs did, in the summer of 1854, acquire a right to the water in dispute, then the law presumes they retained the right so by them acquired, and the burden of proving an abandonment on their part is with the defendants. This was refused, because there was no testimony showing that in 1854 the plaintiffs had acquired any such right. The instruction, as it stood, was at least ambiguous, and calculated to mislead. The right of the water did not, in strictness, accrue until the completion of the ditch—though the initiatory steps in 1854 might, by force of the subsequent event, have given title as against a subsequent appropriation from 1854, if done in that year. But this gen-

eral language, though proper in some sense, was calculated to convey a wrong impression, as the jury might have inferred that these acts, of themselves, gave a right to the water. When the court gave its reason for withholding the instruction, the appellants, if they desired the charge as to the abandonment to be given to the jury—for the court had fully instructed the jury as to the other portions asked—should have removed this objection to it. Indeed, it is not clear that the whole substance of the legal portion of this charge had not already been given.

The eighth and ninth instructions are, in substance, that the jury should not regard any proof offered of abandonment, inasmuch as no such defense as abandonment is specifically set up in the answer. The complaint is general, not setting forth the character of title, or the facts constituting the title of plaintiffs. It avers, in general terms, that "on or about the month of July, 1854, the said plaintiffs and their predecessors claimed, located, appropriated, and became the owners of, and became entitled to the possession, use and enjoyment of, for mining purposes, the water and waters flowing," etc. The answer denies this general averment. Thus is put in issue the very question of title, and this involves necessarily the due prosecution of the work after the appropriation, or, in other words, after the indication by some palpable and unequivocal outward sign of the intent to appropriate. The title to the water does not arise, as we have intimated before, from the manifestation of a purpose to take, but from the effectual prosecution of that purpose. This prosecution, therefore, is a necessary element of a title, and the negation of this, the abandoning of the purpose, is not so much matter in avoidance of a title, as it is matter showing that no title was ever obtained. Besides, if parties go to issue, in actions of this kind, upon general averments and denials of title, we think that anything that legally supports or attacks the title is admissible in evidence, and may be applied by the jury to sustain or defeat it.

The other instructions are not liable to serious objection. Indeed, we may remark that all the instructions given by the court seem not only prepared with remarkable care, but that they present, with extraordinary clearness and accuracy, the various questions of law bearing on the case to the jury.

McDONALD ET AL. V. THE BEAR RIVER AND AUBURN
WATER AND MINING COMPANY.¹

(13 California, 220. Supreme Court, 1859.)

New trial—Attorney's affidavit. The court properly refused to grant a new trial upon the affidavit of the attorney of record that he and defendants were absent from the trial because of an oral agreement by opposing counsel to give notice of the day of trial; when met with counter affidavits denying such agreement and when other counsel did appear for defendants and contest the case.

Pleading—Complaint. In an action against alleged trespassers for the diversion of water, it is sufficient to aver the possession by plaintiffs of the land, and the subject of the inquiry.

Seal—Written instrument as evidence. The characters [L. S.] added to a signature do not constitute a seal unless there is something in the body of the instrument expressive of the intent to make it a sealed instrument, but a general objection will not exclude it when offered in evidence, unless on its face inadmissible or void; though such a paper may not be admissible to prove title, because it is doubtful on its face whether it is the deed of the principal or of the agent executing it, yet it may be admissible to show the date of plaintiffs' possession, and also to show a surrender of possession to him by the actual occupant.

Water—Mining and milling purposes. The appropriation of water for all purposes stands upon equal footing, and a later appropriation for mining purposes is not good against a prior appropriation by a mill.

Mill and mill privileges—Transfer of possession. Right to water acquired by appropriation may be transferred like other property, and the transfer of a mill carries its water privileges. As applied in this case, a transfer of possession without deed was held good against an intervening appropriation between the first appropriation and the time of the transfer.

Sale under power of attorney not under seal—Principal and agent. An instrument not under seal executed by an attorney in fact, authorized so to do by power of attorney not under seal, conveys an equitable estate in the premises which, united to the fact that the vendee takes and retains possession for several years, will enable him to maintain an action for an interruption to his possession or for injury to the property. The rule requiring an instrument to be executed in the name of the principal does not apply to those not under seal and though signed by the agent alone, the principal only will be bound if such appears to be the intention expressed in the instrument.

Title to water. V. acquired certain water rights for milling purposes in 1850. The defendants appropriated water from the same stream, forty miles above, for ditch purposes in 1851. In 1854 plaintiffs succeeded to the rights of V. *Held*, that if V. did not abandon his claim, the appropriation by defendants was limited to water not appropriated by

¹ *Same v. Same*, 15 Cal. 245; *Post* —.

V., and that plaintiff might possibly maintain an action for diversion without connecting their title with V.

Practice on appeal. The appellate court will not consider points raised for the first time on appeal.

Appeal from the Tenth District.

Action for damages for the diversion of the water of Bear River to the injury of plaintiffs' saw and grist mills situated on that stream.

The original complaint was filed March 6, 1857, and an amended complaint filed January 18, 1858. The difference between the original and amended complaint consists in the substitution of the phrase "one thousand inches of water sectional area, with a two and one-half foot head," instead of "one thousand cubic inches of water."

Among other things the complaint avers that plaintiffs "are lawfully possessed of a certain saw-mill and grist-mill, works and premises, with the appurtenances, situate and being in the county of Yuba, California, and situate upon a stream called Bear River, and by reason thereof, etc., * * * ought to have and enjoy the benefit and advantage of the water of said stream or water-course * * * called Bear River."

The complaint also avers, in substance, that, by reason of the diversion of the water by defendants' ditch, plaintiffs have lost the use of their mills; have suffered in the reputation of the mills; have been put to great expense on account of their not running; have lost the profits which would have accrued, and claim damages in the sum of twenty-five thousand dollars.

The complaint describes defendants as the "Bear River and Auburn Water and Mining Company," composed of numerous persons unknown to plaintiffs, etc., but does not aver it to be a corporation.

An answer was filed to the original complaint, denying, generally, its allegations, and setting up the statute of limitations of three and five years, and that defendants were in possession of the land and water, etc., as public land, and using it for mining purposes. To the amended complaint a demurrer was filed, on the ground: 1st. Defect of parties de-

feudant in not averring defendant to be a corporation, etc. 2d. Want of facts to constitute a cause of action. Demurrer overruled February 1, 1858. The attorney of record, Crocker, being absent, the demurrer was argued for him by Mr. Rowe. No time for answering was given, as none was asked. February 8, 1858, the cause was called for trial and in the absence of Mr. Crocker, as also of the defendants and their witnesses, Mr. Rowe, an attorney employed by Mr. C. to attend to serving notices, etc., appeared, and a continuance being refused, conducted the trial for defendants. Defendants asked the following instructions, which were refused and exceptions taken:

1st. That unless the jury believe, from the evidence, that the defendants turned the waters of Bear River into the ditch themselves, the plaintiffs can not recover.

2d. That the defendants are not liable for any injury occasioned by miners or others turning the water into the plaintiffs' ditch.

4th. That the jury must be satisfied, from the evidence, that the diversion of the water was not occasioned by any other cause than the defendants' dam and ditch, or the plaintiffs can not recover.

The court instructed the jury as stated in the opinion. Verdict for plaintiffs, twenty-one thousand and eight dollars. Motion for new trial on most of the grounds authorized by law. The grounds mainly relied on were, that neither defendants nor their attorney of record, Crocker, knew of the trial until it was over, because of an alleged verbal agreement on the part of Bryan, attorney of plaintiffs, not to bring the case on without notice to Crocker, and that there was no issue, no answer having been filed to the amended complaint. The motion was based on affidavits by one of the defendants and others, and by Crocker, stating the alleged agreement with Bryan, surprise, etc., an answer being annexed.

A counteraffidavit was filed by Bryan, denying any such agreement, according to the best of his recollection. The court overruled the motion, on the ground that the affidavits of defendants were contradicted, and that it would not notice verbal agreements between counsel. And, further, that the defendants were not entitled to answer the amended com-

plaint after demurrer overruled, without leave of court on motion. Defendants appeal.

E. B. CROCKER and GREGORY YALE, for appellants.

BRYAN & FILKINS, for respondents.

At the July Term, 1858, an opinion was delivered by BURNETT, J.,—TERRY, C. J., concurring, reversing the judgment on the ground that plaintiff, Blackburn, had no interest in the premises, not connecting himself with the possession of A. Van Court.

On rehearing, BALDWIN, J., delivered the opinion of the court—TERRY, C. J., and FIELD, J., concurring.

1. Many technical and minor points are taken by the appellants, which we do not deem it necessary to consider. Some of these are frivolous, and some unsustained by the record. The refusal of the court to grant a new trial upon the affidavit of the attorney was proper. No sufficient cause was shown. If we could listen to affidavits of oral agreements or understandings of counsel, yet the fact that an attorney appeared for the defendant and contested this case on the trial, and the counter affidavits of the plaintiffs' attorneys, sufficiently negatived the grounds of the motion for this cause.

2. Nor is there anything in the objection taken in the demurrer to the complaint. It is a very formal pleading, and is, in itself, unobjectionable. It follows the approved precedents in actions for the diversion of water. It avers the possession of the plaintiffs of the land, and the subject of the injury; and that is enough against trespassers, which the defendants are charged to be.

3. Still worse grounded is the objection that ten days were not given the defendants to answer the formal amended complaint.

4. Upon the trial the plaintiffs introduced evidence for the purpose of showing title to the water in dispute. The plaintiffs claimed that the water had been appropriated by one Van Court before the defendants' right accrued, or they had taken possession, and they claimed that Van Court had gone upon

this land in 1850, and taken actual possession, and built a saw-mill, and afterward a grist-mill, on public land, using the waters of Bear River for mill purposes. Van Court remained in possession, by A. Van Court, his brother, until 1854, when he placed McDonald in possession. The following paper was executed at the time:

“Know all men by these presents, that I, Alexander Van Court, of the county of Yuba, State of California, do sell and convey all the right, title and interest of B. J. Van Court in the property, to wit: one saw-mill, situated on Bear River, with everything appertaining to said mill; also, the one-half of the merchant and flouring mills; also, all the machinery appertaining to said mills; one dwelling-house, kitchen, and one chest of tools (millwright), log chains, etc.; also, all the interest that the said Van Courts have in a ferry or erection of a ferry on Bear River, near said mills; also, the pre-emption of one hundred and sixty acres of land running up and down Bear River, and belonging to said mills, and all the above named property to be free from all arrears; and I, Alexander Van Court, being my brother's legally authorized attorney, do sell, convey, transfer and set over to J. L. McDonald, all the above named property, for the consideration of two thousand dollars, for which I, Alexander Van Court, receive one thousand in hand, and the other thousand at the completion of the Merchant Mills, when the same are in good operative order.

“ALEXANDER VAN COURT. [L. s.]”

This instrument, it will be observed, is not under seal, for though the characters [L. s.] are added to the name of Alexander Van Court, yet no words are in the body of the instrument expressive of the intent to make it a sealed instrument. It was not, therefore, a deed, but only an executory agreement, if sufficient in other respects. It is insisted that this paper was not admissible in evidence; but no specific objection was taken to it at the time it was offered. The general objection was not enough to exclude it, unless plainly upon its face inadmissible or void. The plaintiffs claimed by possession, and this paper, if not otherwise admissible, was proper evidence to show the date of their possession, and, perhaps, the character under which McDonald entered. Besides, the actual occu-

pancy seems to have been in Alexander Van Court, and so far as plaintiffs had gone at the time of offering this paper, it might have been enough to show that the person in actual occupancy, supposing this to be the deed of Alexander and not of B. J. Van Court, had surrendered his claim to the plaintiff, McDonald; so that there was no error in admitting this paper. We shall have occasion to consider this paper and its effect further when we proceed to discuss the merits of this case. The same objection, in the same form, was taken to a paper executed on the 30th March, 1853, by Alexander Van Court to his brother, B. J., and to a paper executed by B. J. Van Court, not under seal, purporting to be a power of attorney to Alexander authorizing the sale of his saw-mill, etc. Under this power Alexander made the sale through which plaintiffs claim. The same remarks so far apply to this paper as to the other.

On the 20th March, 1854, Blackburn made a contract with Alexander, respecting the construction of a grist-mill, by which he became interested in the premises, at least to the extent of the water needed for that mill. It is urged that there was no conveyance to Blackburn of any interest in the saw-mill, or in the one hundred and sixty acres of land. The defendants claim that they appropriated the waters of Bear River in June, 1851, at a distance of forty miles above the mills; and this was prior, of course, to the actual possession of the plaintiffs, but subsequent to the first appropriation by Van Court and one Moore, under whom Van Court claimed. It would seem that if the plaintiffs relied upon their possession alone, they could not by force of it recover damages for a trespass committed before, nor for water diverted prior to their title. Their mere possession would give them title only to that which they possessed. They would take the premises as they found them; and if the water had been diverted from the old channel anterior to the acquiring of their possession, they could not regain it. It was probably in view of this principle that they sought to connect themselves with the title of their predecessors, in order to show that this water in dispute was really a part of their title or property. The ownership of water, as a substantive and valuable property, distinct sometimes from the land through which it flows, has been

recognized by our courts; and this ownership, of course, draws to it all the legal remedies for its invasion. The right accrues from appropriation; this appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use. We have held that there is no difference in respect to this use, or rather purpose, to which the water is to be applied; at least, that an appropriation for the uses of a mill stands on the same footing as an appropriation for the use of the mines. Each of these purposes, indeed, may be equally useful, or even necessary to the miners themselves. But the nature of the use may be important, as denoting the extent of the water appropriated. Water taken for a mill is not taken as an article of merchandise, to be sold in the market; it is merely used as a motive power, and after it passes the mill and subserves its purposes, may be used as an aid to the working of the mines. But this last use must not be inconsistent with the prior right acquired by the mill owner, so far as his necessary use is concerned. This right of water may be transferred like other property. If, by the erection of a mill and the possessory right of land on the stream, the water be acquired, this being evidence of the appropriation of the water, we do not see that the right would not pass by any sufficient transfer of the possession of the property to the vendee, as owner; in fact we do not doubt that it would. And this brings us to consider what we deem the essential matter of this case, whether the plaintiff and Blackburn got the title of Van Court, the first appropriator of the water to this mill. We assume for proven all the disputed or disputable facts upon which the jury have passed directly or in effect, by their verdict. The question of the possession of the premises, the mill, etc., by McDonald, by virtue of *some contract* with Van Court, is not disputed; but it is argued that this contract gives him no title to this water diverted and used, and sold by the Bear River Company. The grounds of this objection we will now consider. It is said that, conceding that title was originally in Van Court, it did not pass to the plaintiff, McDonald, because the paper executed by Alexander Van Court to McDonald, was not legally executed so as to pass the title. The power of attorney from B. J. Van Court to Alexander seems

to be regular in form, except that it is not under seal; though professing in the body of it to be sealed, the scroll is omitted. The power authorizes "Alexander to grant, bargain, sell and convey my saw-mill, dwelling, etc., situated in the county of Yuba. Said mills and other improvements are situated on a tract or claim of land on Bear River." * * "I do grant unto my said attorney full power to execute and deliver all needful instruments, whether under seal or otherwise, * * to perform all such matters, acts, and things as my said attorney shall deem necessary and expedient for the complete and effectual execution of the authority granted," etc.

Under this power Alexander Van Court made the instrument first set out, which, it has already been seen, was not under seal; so that the argument of the counsel for appellants, that the paper executed by the attorney was void, because the attorney could not execute a technical deed, except under authority by deed, has no application to the facts. The power authorizes the execution of needful instruments, sealed or unsealed, and seems, from the comprehensiveness of its language, to impart the largest discretion as to the terms and form of sale to the agent. Taking the agreement, or so to call it conveyance, in connection with the power, and we can see no fatal objection to it. It is true, that, for technical reasons, a deed of an attorney must purport to be the deed and executed in the name of the principal. That doctrine was discussed in the argument of *Dupont v. Wertheman*, 10 Cal. 354, but was not passed on by the court. But this doctrine applies more strictly to technical deeds than to parol contracts. The power is not under seal; it is only a written authority to the agent to contract in reference to the property, etc., and the contract is made by Alexander for the right of the principal in the subject, and the paper recites that "I, Alexander Van Court, being my brother's legally authorized attorney, do sell, convey," etc. The property sold is the property of B. J. Van Court, the principal, and the agent selling represents himself as the attorney of the principal; a consideration is stated, and an authority to sell is shown. The vendee is put in possession, and retains possession for a series of years, making valuable improvements.

That such an agreement might be specifically enforced, and

was a sufficient memorandum in writing to give effect to the contract, we think can not be disputed. See Wood's Dig. Sec. 106.

That by force of such agreement, and the possession taken under it, the plaintiff, McDonald, acquired an equitable estate in the premises, giving him a present right to its full enjoyment, we think, clear, and this right, being united with the present possession, enabled him to maintain any action for an interruption of the possession or any injury to the property.

The case of *New England Marine Insurance Company v. De Wolf*,¹ illustrates the distinction between sealed and unsealed instruments, and shows that the rule requiring the instrument to be executed or signed in the name of the principal, does not apply to instruments not under seal, and the same distinction is expressly stated in *Andrews v. Estes et al.*, 2 Fairf. 267. The cases in all the States, in regard to instruments not under seal, agree that if the name of the principal appear in the instrument, and the intention, on the whole, be apparently to bind him, he will be the party bound, if the agent had authority, although the instrument be signed in the agent's name only. See *Farmers and Mechanics Bank v. Troy City Bank*, 1 Doug. 458, 467. "In an agreement not under seal," said the Chancellor, in the late case of *Townsend v. Hubbard*, 4 Hill, 351, 357 (and see *Townsend v. Corning*, 23 Wend. 436, 440,) "executed by an agent or attorney on behalf of his principal, and where the agent or attorney is duly authorized to make the agreement, it is sufficient as a general rule, if it appears in any part of the instrument that the understanding of the parties was that the principal, and not the agent or attorney, was the person to be bound for the fulfillment of the contract." See, also, *Evans v. Wells*, 22 Wend. 325, 335, 340. In South Carolina, in some earlier cases, this was not admitted, and it has been decided that a note in the form, "I promise to pay," etc., signed "J. L. R. for J. J.," bound the agent personally, and did not bind the principal: *Fash v. Ross*, 2 Hill's South Car. 294; *Taylor v. McLean*, 1 McMullan, 352; *Moore v. Cooper*, 1 Spear, 87. But all these are overruled in *Robertson v. Pope*, 1 Richardson, 501; and the distinction recognized between deeds and parol contracts, that in the former the sealing and delivery must be in the

¹ 8 Pick. 56.

name of the principal, but in the latter it is enough if it appear that the contract was intended to be made for the principal.

5. There is no foundation for the notion that this power of attorney did not embrace the water privilege. The mill sold, or proposed to be sold, would be wholly valueless without it, and the general language is: "including the mill, dwelling," etc., "said mill and other improvements are situated," etc. The deed to a house is held to include the land on which it is, and it would be absurd to hold that a deed to a mill, only of use because of the water which moves it, does not include the right to the water, especially when the phrase *et cætera*, to which Lord Coke attaches such extension of meaning, is used.

6. We have, in these remarks, assumed that these papers were as they are set out in the appellant's brief. But we do not, after looking over the transcript, find them set out. On page twenty-one we find that some papers of this general character were offered by plaintiff and objected to generally by defendant. But the grounds of objection are not given, and the papers not even particularly described. And it seems that "a bill of sale of a portion of mills and property given by A. Van Court to John C. Blackburn" was given in evidence by plaintiff; and this seems to have been done without objection. The presumption is, that what is done by a court of general jurisdiction is properly done, and it rests with the losing party to show affirmatively that there was error.

7. It seems that Blackburn was in possession with McDonald, and it might be inferred that he was interested with him in this mill company and the right to the water. The saw-mill was put up January 8, 1850; the grist mill was commenced in 1853, and was put in operation in the fall of 1854, built on the same side of the stream as the saw-mill. It seems that the mill, before the ditch of defendants, required and used one thousand inches of water. The instruction of the court limited the plaintiff's claim to the amount of water first taken for the mill.

The appellants contend that they took, by the location of their ditch, all the water not needed for the saw-mill; and that their right, by appropriation, was perfect to all, subject

only to the right of the mill owner; that the right of the mill owner was limited to a use of this water for this particular purpose, and ceased immediately when the saw-mill, from want of timber in the neighborhood, or otherwise, ceased its operations as such; and that the plaintiffs, having subsequently built a grist-mill, are not entitled to the water for that mill. Probably it would be enough to say in answer to the ingenious argument on this subject, that the point seems to be taken here for the first time; it is not taken in the answer, nor was it made on the trial. No instruction on the subject was asked by the counsel; nor was it made a point on the motion for a new trial. The point rests on particular facts or inferences, which the jury, if properly instructed, might or might not draw from the evidence—such as the extent of the defendants' appropriation, or of the plaintiffs', as evidenced by the acts of both—the declarations, the relative quantity of water needed for the grist-mill or the saw-mill, the quantity of timber, etc., etc., and many other considerations, which a Court of Appeals could scarcely be called upon for the first time to determine. But even if we felt disposed to permit this matter to be asserted here for the first time, we are far from being convinced that the point is well taken. It by no means follows that, because in an agricultural district a party takes up a mill-seat, gets a good title—as we esteem possession of public land to be—to the land, and makes valuable permanent improvements, all dependent on the use of the water as a motive power—that he means only to use the water appropriated for the first purpose to which he applies it. At any rate, a very clear case should be made that that purpose had been fully answered before his title to the water should be held to be abandoned. The mere fact that he chooses to apply the water which he had a right to use, in whole or in part, if he so chose in sawing timber, to grinding wheat, is no abandonment of his title to it. But the question is not so made on this record as to require from us a decision upon this last point.

8. The plaintiffs claim that they were in possession of this property and these mills in 1854; that at that time, and since, they were entitled to this water to work their mills; that this quantity was not permitted, at the time laid in the

complaint, to flow to their mills, but was diverted by the ditch; and for this they claim damages. Possibly it was enough for the plaintiffs to show the simple fact that they were in the use of this water, as against every one claiming by subsequent right, without calling to their aid any antecedent title to their entry, for the location by defendants of their ditch in 1851, supposing that to be an appropriation of waters of Bear River from that time, was only an appropriation of so much as was not before appropriated by Van Court, and no abandonment is shown by him, but on the contrary, it is shown by plaintiffs' proof that McDonald and Blackburn succeeded to the possession of Van Court. For the damages resulting after they came into possession, it would seem they could jointly maintain this action on that possession; at all events, this question of misjoinder, or want of common interest in the subject of the suit, should, if it appeared by the plaintiffs' evidence, have been taken by motion for nonsuit, or upon instructions. The plaintiffs, if the point had been made, might have dismissed the suit as to Blackburn, but if permitted to wait until after a new trial is denied, without making the point, it would throw upon us the trouble of searching every transcript to see if ingenious counsel here were right in the suggestion of points which ought to have been, but were not, made below. This would give a great advantage to the appellants; for a statement is usually made up with reference to the points actually made below, and there would often be advantages taken in the statement, or effect given to it wholly different from what was foreseen or expected. Besides the unsatisfactory nature of such an inquiry, our labors would be interminable if we were compelled to search every record for the purpose of seeing if some new point resting on the evidence, but never taken by counsel below, was well founded in law or fact.

These observations apply to the question on the statute of limitations, insisted upon as a defense. No instruction was asked. Nor do we see how it could be. The injury was not from the location of the defendants' ditch. That was a subsequent appropriation, secondary and subordinate in right to the plaintiffs as it was claimed. The diversion complained of was since the period barring the claim for damages; and the

statute could not operate merely from the fact that the defendant had made a claim; it must have been shown that he made an exclusive claim with possession.

The instruction given by the court, at its own instance, fairly placed the law before the jury on the main question in the case. It is in this language: "If the jury should find from the evidence that the plaintiffs were the first to acquire a right to the use of the water flowing in Bear River, and that the defendants subsequently diverted the waters of the stream to the extent of depriving the plaintiffs of the same quantity of water which they originally possessed as prior locators, then they should find for the plaintiff—but if the water which the defendants took by means of their ditch, or other means, did not diminish the quantity of water, then no injury resulted to plaintiffs, and they should find for the defendants. The principle is, as decided by our courts, that he who is first in time is first in right. The jury should take into consideration the quantity of water which was necessary for the plaintiffs in running their mill, for if there was an excess of water for this purpose, any other locator or proprietor is entitled to have it."

9. The three instructions refused were, as proposed, manifestly erroneous upon their face, and were properly denied.

10. There is no error in admitting proof of Dwyer's signature to the paper; no grounds for excluding it were assigned, nor does it even appear that the paper was admitted or read. It might have been proper to locate and explain the premises.

11. The objection to the refusal to admit the question, "Do you know of any other ditches taken out of this stream, or do you know whether the waters are taken out above the mill, by any other company, for any other purpose?" does not give us such information in reference to the subject as to enable us to decide whether the question was admissible. This might well have been refused on several grounds. It is not material whether there was at the time of the trial any other diversion of water from this dam; nor is it apparent that there was error in refusing a question so broad as to admit proof of water taken so far above the mill as to be beyond the ditch of defendant. It must be affirmatively shown that there was error in the ruling of the court, before, on an incidental point like this, we can reverse on account of it.

We have given the case all the consideration we could extend to it, consistently with other engagements, and we think the judgment should be affirmed.

McDONALD ET AL. V. THE BEAR RIVER AND AUBURN WATER AND MINING Co.

(15 California, 145. Supreme Court, 1860.)

Water—Damage for diversion. A verdict for damages in an action at law for diversion of water, does not establish the quantity of water to which the plaintiffs are entitled, nor is it to be presumed that the whole number of inches claimed in their complaint was proved to and found by the jury; and the averment of such former recovery is not of itself sufficient to support an injunction against further diversion.

Appeal from the Tenth District.

The answer in the original action was general denial, want of jurisdiction, and statute of limitations. See 13 Cal. 220.¹

The judge below first granted a rule to show cause why an injunction should not issue as prayed for. On the return day of the rule defendants demurred to the complaint, on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The motion for injunction was based on the complaint, and an affidavit as to the fact that the dam and ditch of defendants did divert the water, etc., as averred.

The court below granted the injunction, and from this order defendants appeal.

HEYDENFELDT and E. B. CROCKER, for appellants.

C. E. FILKINS and T. B. REARDAN, for respondents

COPE, J., delivered the opinion of the court—BALDWIN, J., and FIELD, C. J., concurring.

This is a suit in equity to enjoin the defendants from di-

¹ Ante 626.

verting a certain quantity of the water of Bear River. The plaintiffs allege that their right to one thousand inches of the water, as against the defendants, was adjudicated in a former action. The record in such action is made a part of the complaint. It was alleged in that case that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes, that such quantity was necessary for their use, and that the defendants had diverted the same to their damage, etc. The plaintiffs obtained a verdict and judgment for twenty-one thousand eight hundred dollars in damages. It is contended that by this verdict and judgment the quantity of water to which the plaintiffs are entitled was conclusively determined, and that the defendants are estopped from putting the same matter again in issue in another suit. The allegations of the complaint look to equitable relief only, and are not sufficient to authorize a determination of the legal rights of the parties. If these rights were not determined in the original controversy, the case necessarily falls to the ground.

The principle by which the decision of this case must be governed, has already been passed upon by this court in *Kidd v. Laird*, 15 Cal. 161.¹ We there held that a general verdict did not operate as an estoppel, except as to such matters as were necessarily considered and determined by the jury. Our further examination of the question in this case has not changed our opinion, but furnished us many additional reasons in favor of its correctness. "In order to constitute an estoppel," said Chief Justice Shaw, in *Eastman v. Cooper*, 15 Pick. 276, "the same point must be put in issue, upon the record, and directly found by the jury. Wherever a point of fact has been so put in issue, and found by a jury, then the record is regarded as conclusive of that fact, whenever it is again drawn in question by the parties, or their privies." In *Gilbert v. Thompson*, 9 Cush. 348, the law is declared to be well settled, "that a judgment in a former action is conclusive only when the same cause of action has been once adjudicated between the same parties, or the same point has been put in issue upon the record, and directly found by the verdict of the jury." It was held in *Potter v. Baker*, 19 N. H. 166, that "a fact found by a verdict and judgment, to consti-

¹ *Post*, DITCH

that an estoppel, must be *res judicata*; that which was necessarily and immediately found according to the pleadings, not that on which the verdict was merely based—a fact in issue, as distinct from a fact in controversy.” It is too well settled to be controverted, that a verdict is never conclusive upon immaterial or collateral issues: 1 Story, 474; 8 Wend. 40; 7 Pick. 146.

In respect to the controversy upon which this suit is based, we regard the averment in relation to the quantity of water to which the plaintiffs were entitled as immaterial. It was an action for damages, and the right of the plaintiffs to recover could not have depended upon proof of this averment. If it had appeared that they were entitled to but five hundred inches of water, instead of one thousand, as alleged, and that the quantity to which they were really entitled, or any part of it had been diverted, the result must still have been the same. The jury would have given them a verdict for whatever damages they had sustained. If they had claimed the entire water of the stream, and the evidence had shown that they were only entitled to a portion of it, their right to recover for what they had actually lost could not have been prejudiced by their claim to a greater quantity than they were in fact entitled to. And if this be true, how extremely absurd it would be to hold that such a recovery established their right to the extent of the limit which they themselves had assigned to it.

If the defendants are bound by the verdict as it is, the plaintiffs would have been equally concluded by it had it been different. If the verdict establish the right of the plaintiffs to one thousand inches of water, a verdict for the defendants would have been equally conclusive in their favor, against the right of the plaintiffs to any quantity whatever. A doctrine involving results so palpably erroneous, can not, of course, be maintained. The immateriality of this averment is further shown in the fact, that by the rules of pleading, no issue could be taken upon it. A denial that the plaintiffs were entitled to a particular quantity of water, would have been clearly insufficient. Admitting that they were not entitled to the quantity claimed, *non constat* that they were not entitled to a less quantity, and that this quantity had not been diverted by the defendants.

From these views, it follows that the averments in the complaint are not sufficient to entitle the plaintiffs to the relief which they ask. Upon the return of the cause to the court below, if the plaintiffs desire to amend their complaint so as to present their legal rights for the determination of a jury, they should be permitted to do so. Otherwise the case should be dismissed.

The order granting the injunction is reversed, and the cause remanded.

WEAVER ET AL. V. EUREKA LAKE COMPANY.

(15 California, 271. Supreme Court, 1860.)

Water rights—Verdict of jury. The question of diligence in making surveys and constructing ditches for the appropriation of water being submitted to a jury, for the purpose of determining whether plaintiffs' claim would date from the commencement of their operations, and the evidence being conflicting, their verdict was held to be conclusive.

Damnum absque injuria. Defendants erected dams at the outlet of certain lakes resulting in injuries to the plaintiffs, but attempted to justify on the ground that the reservoirs thus created were of great value. *Held*, that if the injuries were trivial they might be considered *damnum absque injuria*; but that the legal superiority of conflicting rights could not be determined by a comparison of their values.

Invalid water claim. A claim of water merely for speculation and not intended for any useful purpose is invalid.

Appeal from the Fourteenth District.

Action for damages for the diversion of water from certain lakes in Nevada county.

The defendants claimed a right to the water by various conveyances from one Sisson, who in July, 1853, placed notices at the outlet of the lakes claiming the water, which were signed Sisson & Co. He never made any survey, placed any stakes, or constructed any ditch for the appropriation of the water.

In 1854 and 1855, the plaintiffs, with others, constructed a flume and dam for the appropriation of the water. The other facts are sufficiently stated in the opinion.

Verdict and judgment for plaintiff for \$3,000.00 damages. Defendant appeals.

HENRY MEREDITH, for appellant.

McCONNELL & NILES, for respondents.

COPE, J., delivered the opinion of the court—FIELD, C. J., and BALDWIN, J., concurring.

This is an action to recover damages for damming up and diverting the water of certain lakes in Nevada county. The complaint is in the usual form in such cases alleging a right by appropriation in the plaintiffs, and an improper interference with that right by the defendants. The averments of the complaint are controverted by the answer, and a prior and superior right asserted in the defendants. It can hardly be expected that we will undertake the task of a critical examination of the testimony, for the purpose of determining whether, upon the weight of the evidence, the verdict was right or wrong. We have so frequently declared the rule upon this subject, it is unnecessary to repeat it again. It is contended, however, that there was no conflict of testimony upon the question of the priority of the rights of the parties, and that upon this point the verdict is entirely unsupported by evidence. If this be true, it, of course, disposes of the case.

Both parties claim the water for mining purposes, and the right of each is based upon the construction of a ditch, by means of which it is alleged that the appropriation was effected. It was shown that the plaintiffs, some time in June, 1853, posted certain notices claiming the water of the Middle Yuba river and its tributaries, and stating their intention to construct a ditch or flume, and appropriate the same for the purposes mentioned. It was further shown that, in the following month, they commenced their surveys on the contemplated line of the ditch, and that these surveys were, in due course of time, prosecuted to completion, and followed up by the actual construction of the work. It is claimed that the plaintiffs did not prosecute their enterprise with sufficient

diligence, and that their rights do not, therefore, date by relation from the commencement of their operations in 1853; but the question of diligence was necessarily passed upon by the jury, and their verdict is conclusive. It is not pretended that the defendants did any act toward the construction of their ditch until the summer of 1854, but evidence was introduced for the purpose of connecting them with a right to the water of the lakes in question, claimed by other parties, who had put up notices of their appropriation early in July, 1853. Irrespective of any question as to the validity of this claim, we think the conclusion of the jury fully justified by, and in strict conformity with the evidence. The notices of the plaintiffs claiming the same water, were as valid and effectual as the notices of these parties could have been, and the proof is that they were first posted.

It is proper, in this connection, to notice another question, which is discussed at some length in the briefs of counsel. There are three lakes, the water of which constitutes the subject of this controversy. They are situated one above the other, and discharge their water into the Middle Yuba river through the same channel. This channel is about one mile in length, and is called "lake stream." The quantity of water discharged varies with the seasons. Sometimes the stream is a torrent, and at others, it is almost or quite dry. The defendants, for the purpose of creating a supply of water for their ditch during the summer months, erected a dam at the outlet of each of these lakes, by which means it was converted into a sort of reservoir, from which the water was drawn as their necessities required. It is contended that under the circumstances, the erection of these dams was justifiable and proper, and that the great value of the lakes as reservoirs is a sufficient justification for injuries resulting to the plaintiffs. We are aware of no principle of law upon which such a position can be maintained. If the injuries to the plaintiffs were of a trivial character, they should, perhaps, be considered *damnum absque injuria*; but a comparison of the value of conflicting rights, would be a novel mode of determining their legal superiority.

The question whether the defendants had a right to turn into the lake water obtained from another source, and take out

the quantity thus turned in, does not properly arise in the case; for it does not appear with sufficient certainty that any water was so turned in by them during the period in which damages are alleged to have accrued.

We see no error in the instructions of the court. Those to which objections are principally urged, relate to the validity of the claim to the water of the lakes purchased by the defendants. The evidence in relation to this claim is perfectly plain and uncontradictory, and, we think, shows conclusively that the claim was invalid, and without the semblance of law to support it. The water was not claimed for any useful or beneficial purpose, or in contemplation of a future appropriation for any such purpose, by the parties claiming it. It was a bare claim; for no other object, that we can discover, than that of speculation. The court would have been justified in instructing the jury to disregard it entirely.

Judgment affirmed.

GORE V. McBRAYER ET AL.

(18 California, 583. Supreme Court, 1861.)

Prospecting contract—Tenants in common. G. and McB. agreed verbally to prospect for quartz, and to share equally in claims taken up. McB. discovered and located a claim in the name of G. and others. *Held*, that G. had a good title by appropriation, that the agreement need not be in writing, that the appropriation made by McB. for G. was equally valid as if made by himself; indeed G.'s consent would be presumed, the act being for his benefit, and a subsequent cancellation of G.'s name in the notice of appropriation without his consent would not defeat his title. *Held*, that G. and McB. were tenants in common.

District rules. The courts will not inquire into the regularity of the modes by which miners adopt their local laws, unless fraud or some other like cause be shown for rejecting the laws. It is enough that they agree upon their laws.

Appeal from the Fifth Judicial District.

Gore brought ejectment for an undivided eleventh part of the "Grizzly" claim upon the following state of facts:

Gore, McBrayer, and nine others, who had been working the "Blue Lead" together, agreed verbally to prospect for quartz, and to share equally in what was discovered.

McBrayer went to prospecting, and in October, 1858, discovered the "Grizzly," and put up a notice of discovery, containing the name of himself and Gore with nine others, none of whom belonged to the Blue Lead Company. The following day one Wyatt, under instructions from McBrayer, tore down the notice and substituted another, leaving out Gore's name.

McBrayer, who alone had discovered the Grizzly, retained possession of it, and refused to recognize Gore as having any interest in it, and sold certain interests to other parties.

On the trial plaintiff introduced the rules of the mining district, and proved that they were passed at a large meeting of miners. Defendant objected, because they were passed two days before the time named in the notice of meeting. The objection was overruled, and defendant's excepted.

Defendants requested the following instructions, the first of which was refused absolutely, and the others refused as stated below:

1. That in order to constitute a copartnership in the taking up and locating of quartz claims, it is necessary there should be a contract in writing.

2. That if a partnership existed, as contended for by plaintiff, the defendant, McBrayer, had the right to withdraw at any time, and that if the jury believe from the evidence that he did so withdraw before the discovery by him of the Grizzly claim, then Gore, the plaintiff, had no interest in said claim by virtue of such copartnership.

The court refused, except with this modification: "That the fact of their being copartners in prospecting, did not make them copartners in the Grizzly claim after they had discovered it; that they then ceased to be partners, and became tenants in common."

3. That a copartner can withdraw from a general copartnership at any time he pleases without assigning any reason therefor, and from the time of such withdrawal he ceases, as between himself and his copartners, to be such partner.

The court again refused, except with this modification:

"That parties holding a quartz claim are not considered as partners in law."

Verdict for plaintiff. Defendants appeal.

H. P. BARBER, for appellants.

L. QUINT, for respondent.

BALDWIN, J., delivered the opinion of the court—FIELD, C. J., and COPE, J., concurring.

Ejectment for a mining claim. Conceding, for the purposes of the decision, that a partnership for the purchase of mining claims is a partnership for dealing in land, and that the agreement must be in writing, within the statute of frauds, in order to entitle the several partners to any interest or share in the land purchased by one, still it seems to us that the appellants can not avail themselves of this principle to defeat the plaintiff's action.

It appears that the plaintiff, Gore, and defendant McBrayer and others, verbally agreed to prospect for quartz, and to be equally interested in claims taken up, and that McBrayer discovered this lead or claim, and located it by putting up a written notice with plaintiff's name and others on it, and thus making claim to the lead. This process seems to be the usual mode recognized among miners to indicate the taking up of a claim of this sort—as, in fact, an appropriation or proof of appropriation of the claim. As the title comes from appropriation made in accordance with the mining rules and customs, and as it is not necessary that a party should personally act in taking up a claim, or in doing the acts required to give evidence of the appropriation, or to perfect the appropriation, it would seem that such acts as this are valid to give title to the claimant, if done by any one for him or with his assent or approval. Indeed, we suppose that the assent would be presumed when the name of a party is used in taking up a claim, or what is the same thing, inserted in a notice which is the external manifestation of the purpose to appropriate—upon the principle that a party is presumed to assent to a deed or other act plainly for his benefit. Any recognition of the authority of the person acting for such claimant, or adop-

tion of the act evidenced by the notice or claim, would be sufficient to give it validity—certainly, if nothing had intervened between the notice and the adoption or recognition to alter the relations of the parties to the claim. But it is enough to say, that in this case the agreement operated as the authority from Gore to McBrayer to take up this claim or any other, and to use his (Gore's) name for that purpose. It is as if Gore had made McBrayer his agent to take up the claim for him and in his name; and, upon the performance of the act, Gore's title, so to speak, vested, and he was the owner, subject to the rules of the vicinage, of the claim, or his share of it. We do not see what the statute of frauds has to do with such a case. The title to the land is in the United States; the right to mine and to use and hold possession of the claim inures by a sort of passive concession of the government to the discoverer or appropriator. No writing is necessary to give the miner a title; but whatever right he has originally comes from the mere parol fact of appropriation, unless, indeed, the rules or the customs prevailing in the vicinage, or recognized among miners, make a written notice necessary, and unless, further, this notice be a writing within the meaning of the rule applicable to real estate titles. If this be so, then the plaintiff would have the required written evidence of title—his name having, with his consent, been inserted in the notice. However this may be, we consider that all that the plaintiff was required to do to give him all the right to be derived from an appropriation of this claim, was to authorize it to be taken in his name, and then the consequent act of the defendant in making the claim in plaintiff's name and for his use in the notice perfected his right. The right of Gore having attached in this way, his claim was like any other fixed right, and could not be divested by the mere act of the agent or associate McBrayer, in taking down the notice and putting up other notices with other names: See *McGarrity v. Byington et al.*, 12 Cal. 426, for the principle of this case.

2. There is nothing in the point that the mining laws offered in evidence were passed on a different day from that advertised for a meeting of miners. We can not inquire into the regularity of the modes in which these local legislatures or primary assemblages act. They must be

the judges of their own proceedings. It is enough that the miners agree—whether in public meeting or after due notice—upon their local laws, and that these are recognized as the rules of the vicinage, unless some fraud be shown, or some other like cause for rejecting the laws. It is not necessary to consider the other points. The instructions asked were abstract, in the view we have taken of the case. After the notice containing the name of Gore, he became a tenant in common of the mine, and might bring this action to vindicate his title against any one who excluded him and denied his right. We think the circumstances do not make out a partnership, but only a tenancy in common.

Judgment affirmed.

Upon a petition for rehearing, the opinion of the court, per the same justices, was as follows:

Petition for rehearing.

The error of the ingenious argument of the appellant's counsel has been exposed in the opinion reviewed by the petition. It is in supposing that a writing is necessary to vest or divest a title on taking up a mining claim. The title is in the government; if a written contract is needed to divest it, the government would have to execute it. But, subsidiary to the government's paramount title is the permissive claim of the locator. This comes from a mere parol fact, evidenced in the present case by a notice; this notice is a mere advertisement of this parol fact. A verbal authority is sufficient to authorize an agent to make the entry, or to get up the notice. No title is divested out of the government by this process, but a right of entry given under the government. When acting for himself, or for any other who authorized the act, these acts confer this permissive title to the public mineral land, and the statute of frauds has no application to this class of cases. It is not a mode of vesting, or transferring title from the owner of the fee or holder of the title, but a mere mode of showing that the locator has availed himself of the government's concession of the privilege of occupying and using the ground. This right may be exercised through an agent or servant; whenever the appropriation is made by an agent having authority from a principal to make it, the act is com-

plete and title vests in the principal, and the agent, by his mere act, can not subsequently divest it. If the local law were that any man might take up a mining claim by advertising the fact in a newspaper, and A agreed to take up a claim for B, and did advertise the claim in the paper, we apprehend he could not afterward be heard to say he had no written authority, for if allowed to dispute his own act, the answer would be that it required no written instrument to impart authority to make the advertisement in the name, or even to use the signature of the principal.

Rehearing denied.

McKINNEY ET AL. V. SMITH ET AL.

(21 California, 374. Supreme Court, 1863.)

Water rights—Diversion—Limited appropriation. The appropriation of the water of a stream, in order to apply it to some useful purpose, secures a right which can not be infringed upon by a subsequent appropriation of the water by others, but diverting the water from its natural channel for the purpose of drainage simply, is not an appropriation of the water; and one who has appropriated water for a special purpose can not afterward appropriate the surplus to the detriment of others, who in the *interim* have appropriated that surplus.

Copy of notice as evidence. A copy of the notice of appropriation prepared with the knowledge of the appropriators, seen by some of them as a posted notice, and posted where it must have been seen by others, is admissible in evidence to show the limited character of the appropriation.

New trial. A new trial will not be granted for the purpose of having the language of a finding made more exact, when it is sufficiently distinct as to the subject-matter of the action.

Appeal from the District Court of Tehama County, Fifteenth Judicial District.

Suit was brought in the District Court of Shasta county and transferred before trial to Tehama county, where it was tried by consent by the court without a jury. The plaintiffs claimed \$20,000 damages for the pollution and diminution of water appropriated by them for mining and agricultural purposes.

It appeared in evidence that in November, 1853, the plaintiffs built a dam at a certain point on Clear Creek, and from this dam constructed a ditch to Slate Gulch, which emptied into Clear Creek half a mile below the dam; that the following winter the plaintiffs turned the water of Clear Creek into Slate Gulch through their ditch, which was of sufficient capacity to convey all the water at its ordinary stage. That late in 1854 the defendants dug a ditch several miles above plaintiffs' dam and thus diverted the water of Clear Creek for mining purposes; still later the plaintiffs extended their ditch several miles below the dam and used the extension to supply water for mining and irrigation.

Defendants claimed that the original purpose for which plaintiffs constructed their dam and ditch was to divert the waters of Clear Creek so as to enable them to work mining claims in the bed of the stream just below the dam, and that plaintiffs had not appropriated the water for any useful purpose before the construction of defendants' ditch. In support of this claim defendants offered in evidence what purported to be a copy of a notice recorded by plaintiffs in the recorder's office of Shasta county, which read as follows:

"Know all men whom it may concern, that we, the undersigned, have taken possession of a section or point on Clear Creek about one-half mile below Briggsville and about two hundred yards above the Norwegian Wheel, with the view and purpose of constructing and building a dam across said creek at said point, with the view of diverting and turning the water out of the bed of said stream at and below the said dam, in order to facilitate the working and the more effectually enabling us to work the bed of said stream below said dam to the extent of four claims, subject to equitable regulations. Nov. 10th, 1853." Signed with the names of the persons who composed the plaintiffs' company and who constructed the dam and ditch. No proof was made that any of plaintiffs' company signed this notice or posted it; but it was shown by witnesses that a notice of the same purport, and to the best of their judgment, the original of this copy, was made out and posted at the point where the dam was made about the time the work upon it was commenced; that this notice remained posted for some time and was seen by some of the

company, and was in a position where it might have been seen by all.

Plaintiffs objected to the introduction of this notice on the ground that it had not been shown that plaintiffs executed it, or were bound by it. The objection was overruled and plaintiffs excepted.

Plaintiffs proved that some Norwegians who had mining claims below the dam and above the mouth of Slate Gulch had assisted in the construction of the dam and ditch, under an agreement that they were to have a certain portion of the water of the ditch with which to work their claims. It was also shown that both the Norwegians and plaintiffs used the water in washing dirt from their claims the same season that the dam and ditch were completed.

The district court found that the object of plaintiffs in building the dam and ditch was to divert the water from their claims and not to appropriate it for mining purposes, and refused the relief sought and entered judgment for defendants.

The plaintiffs moved for new trial, but this being denied they appealed, both from the order and judgment.

W. H. RHODES, for appellants.

A. P. CRITTENDEN, for respondents.

NORTON, J., delivered the opinion of the court—FIELD, C. J., and COPE, J., concurring.

The appropriation of the water of a stream in order to apply it to some useful purpose secures a right which can not be infringed upon by a subsequent appropriation of the water by others. But in the case of *Maeris v. Bicknell*, 7 Cal. 261, it was decided that diverting the water from its natural channel for the purpose of drainage simply is not an appropriation of the water. And in the case of *Ortman v. Dixon*, 13 Cal. 33, it was decided that the taking up of the water of a stream for a particular purpose—to wit: to run a mill—was an appropriation of only so much of the water as was necessary for that purpose, and did not secure a right to all the water at that point, if there was more than enough for that

purpose, and that a person so appropriating the water for the special purpose could not afterward appropriate the surplus to the detriment of other persons who had in the *interim* appropriated that surplus.

In this case the plaintiffs and those under whom they claim built a dam across Clear Creek and by means of a ditch conducted all the water of the stream into Slate Gulch, through which, as a natural channel, it flowed back into Clear Creek at a point some distance below the dam. After their works were completed they worked the bed of Clear Creek below the dam and above the mouth of Slate Gulch for mining purposes. Soon after the water was thus conducted into Slate Gulch, the defendants commenced a dam and ditches on Clear Creek, by means of which they appropriated the water for mining purposes at a point many miles above the plaintiffs' dam. After this the plaintiffs, by means of flumes and ditches, conducted the water from the point where it was first discharged into Slate Gulch across that gulch, and appropriated it to the use of mining and irrigating at points below Slate Gulch. The court below found as a fact, that the turning the water from Clear Creek into Slate Gulch was a diversion to dispense with the water and not a diversion for appropriation. And as a conclusion of law the court decided that "defendants being the prior locators were entitled to the use of the water, and that plaintiffs can not maintain an action for damages for the causes set forth in the complaint." The plaintiffs moved for a new trial, on the ground that the evidence was insufficient to justify the finding of facts upon which this conclusion is founded. The fact found upon which this conclusion rests is, that the turning of the water by the plaintiffs into Slate Gulch was a diversion to dispense with it and not to appropriate it.

The grievance stated in the complaint is the injury caused to the plaintiffs in their use of the water for mining and irrigating purposes below Slate Gulch. It does not appear in the complaint, nor is it urged on the argument, that the use of the water by the defendants has interfered with any use of the water by the plaintiffs at any point between their dam and Slate Gulch. Between these points the evidence shows, and the court finds, that some use of the water by the Norwegians

for mining purposes was made before the defendants began their works, and it was proved, also, that the water from the ditch was used to work the bed of the creek. The use of the water by the Norwegians, to be taken from the ditch, was provided for at the inception of the project, and its actual use by them, and its use in working the bed of the creek, is conclusive that the water was in fact appropriated for use between the dam and Slate Gulch before the defendants' right accrued. The notice posted by the plaintiffs is, however, very explicit that their purpose in taking possession of the section or point on the creek was to build a dam "with the view of diverting and turning the water out of the bed of said stream at and below said dam, in order to facilitate the working and the more effectually enabling (them) to work the bed of said stream below said dam to the extent of four claims, subject to equitable regulations." It is not necessary to decide whether the terms of this notice are such as would estop the plaintiffs from claiming a right, as against subsequent appropriators, to the use of the water in their ditch so far as it was necessary to work the bed of the creek to the extent of four claims, because we think this notice, as well as all the other facts proved, establishes that at most the water was appropriated for a special and limited purpose—to wit, the working of the bed and banks of the creek below the dam to the extent of four claims, or, at the farthest, to the mouth of Slate Gulch—and that hence, the court below, under the rule cited from the case of *Ortman v. Dixon*, rightly decided that this action could not be maintained for damages for the causes set forth in the complaint, which were, as we have seen, for injury to the use of the water below Slate Gulch.

We are aware that in the case of *Maeris v. Bicknell* it was decided that a party who makes an appropriation of water can change the place of its use, as by an extension of the ditch, without losing his priority as against those whose rights have attached before the change, but the court expressly reserved the expression of any opinion whether a party could change the use of the water from one purpose to another without losing his priority. In this case there was no general appropriation of the water by the plaintiffs before the defendants' rights attached. The direct object of their works was to drain the

bed of Clear Creek at a certain point, and the ditch was necessarily of sufficient capacity to carry all the water in order to effect that object, and they may have had a prior right to the use of sufficient water to work the bed of the creek at that locality without thereby securing a prior right to all the water of the creek, to be used in some distinct and separate undertaking, at any indefinite future period, in the same manner as a sufficient quantity might have been appropriated to run a mill without securing a right to the surplus to be afterward applied to mining purposes. There may be difficulty in many cases in determining that the appropriation was limited to a special purpose or to a particular locality. Each case must be decided upon its peculiar facts. In this case the limited character of the right is distinct and clear, and it would be a serious restriction upon the valuable use of the means of carrying on mining in this State if an appropriation of the limited character proved in this case, assuming that there was such an appropriation, could have the effect to withdraw all the waters of such a creek from all other use for an indefinite period. On the facts, as they existed when the defendants began their works, they had the right to appropriate the water to any use that would not interfere with the plaintiffs' use of it for the special purpose to which they had then appropriated it.

No *express* distinction is made by the plaintiffs in their complaint, or by the court in its finding, between the right of the plaintiffs to the use of so much water as might be necessary to work the bed of Clear Creek above Slate Gulch and their right to use the water for mining or irrigating purposes below Slate Gulch. But the plaintiffs allege that by their ditch they conducted the water onto mining grounds two miles below the dam, and the diagram shows the agricultural land to be still farther below. It is for injury to the right to use the water at these localities that the complaint seeks redress. Slate Gulch is only half a mile below the dam. In its finding the court says: "No survey was made for a ditch below Slate Gulch at that time (November, 1853) and for some time after, nor was any notice given or tree blazed, or stakes set to mark such line. The water was discharged from their ditch into Slate Gulch, and through the natural channel of Slate Gulch found its way back to Clear Creek *below the*

mining claims and notice of plaintiffs. This was clearly a diversion to dispense with the water and not a diversion for appropriation." And the conclusion of law, which is the matter particularly specified as the ground for asking a new trial, is, as before stated, that the "plaintiffs can not maintain an action for damages *for the causes set forth in the complaint.*" It is clear that the question which was litigated by the parties and considered by the court was, whether the plaintiffs had appropriated *all* the water of Clear Creek at the time they diverted it and discharged the bulk of it into Slate Gulch; and the finding of the court is, in substance, that they had not appropriated that portion which was discharged into Slate Gulch, and in reference to which this action was brought. It is not requisite to order a new trial for the purpose of having the language of the finding made more exact, when it is sufficiently distinct as to the subject-matter of the action.

The proof was sufficient to authorize the notice to be given in evidence as a part of the *res gestæ*.

It was shown to have been prepared with the knowledge of some of the copartners, and seen by them as a posted notice; and that it was so posted as that, in the language of one of the witnesses, it "must have been seen" by the others.

We think the case was properly decided, and that the judgment should be affirmed.

WIXON V. THE BEAR RIVER AND AUBURN WATER AND MINING COMPANY.

(24 California, 367. Supreme Court, 1864.)

Assignment of errors. Grounds of appeal not set forth in the statement will not be considered on appeal.

Miners' rights not paramount. The rights of miners and persons owning ditches constructed for mining purposes are not paramount to all other interests regardless of the time or mode of their acquisition, but the miner or ditch owner must exercise his rights subject to prior vested rights in others.

Appeal from the District Court of Placer County, Eleventh Judicial District.

Plaintiff filed his complaint in May, 1861, and averred that in 1854 he enclosed about two acres of land and planted the same with fruit trees, etc. That defendant owned a ditch which conveyed water from Bear River for mining purposes, and which passed a little above plaintiff's enclosure. That in 1856 defendant constructed a reservoir across the ravine which passed by plaintiff's orchard, and turned the waters of his ditch into the same, and that since the summer of 1860 defendant had opened the gate of the reservoir each week and caused the water, with mud and sediment which had accumulated therein, to rush out and overflow plaintiff's orchard. The complaint concluded with a prayer for damages and a perpetual injunction.

Defendant answered that plaintiff's orchard was upon the public domain and contained valuable gold mines; that it was also along a ravine, a natural water-course, which had for a long time been used by defendants to convey water from their ditch to mines below, and that defendants had a right to the use of the ravine for that purpose.

The answer also denied all other material allegations of the complaint except that plaintiff had enclosed and planted his orchard in 1854, and that defendant's reservoir was constructed in 1860.

Verdict and judgment for plaintiff and injunction allowed restraining defendant from flooding plaintiff's orchard.

The court gave the following instructions to which defendant excepted:

"If the plaintiff was in the possession of his premises before the construction of the defendant's reservoir, then the defendant has no right to run out the water accumulating therein, carrying with it sand and sediment, onto the plaintiff's premises, and to his injury, and if defendant has done this, you will find for plaintiff.

"If the plaintiff possessed his premises prior to the appropriation of the water of the ravine by defendant, then the defendant's appropriation was subject to the prior rights of the plaintiff, and if this is so, then the defendant is liable for in-

juries resulting to the plaintiff's premises from its use of such water subsequently appropriated."

The following are the instructions asked by the defendant and refused, to which refusal defendant excepted:

"If the jury find that defendant is a company for the purpose of supplying water to miners for mining purposes, and that the premises and ravine mentioned in this case are within the mining district of this State, then the defendant has the right to appropriate, by means of a reservoir or otherwise, the natural waters of Miners' Ravine, and also the right to the necessary means for such enjoyment.

"The plaintiff can not by appropriation of land or otherwise prevent the free flow of water and tailings in a natural ravine situated in a mineral district; and any improvements created or erected in the channel of a ravine must be subject to the right of miners upon the ravine, and also the right of defendant to a free enjoyment of its right, and a free and unmolested flow of water.

"All miners, and defendant as a company organized for mining purposes, have the right to the free use and benefit of natural water-courses and reservoirs, and plaintiff has no right to interfere in any manner with such right, and if by reason of plaintiff's interference with the free use of the reservoir he has suffered injury, defendant is not responsible.

"The right to use and enjoy the ravine and its privileges carries with it the right to such privileges as are necessary to the enjoyment of the right."

The following are the only grounds of appeal set forth in the statement:

"Defendant's grounds of appeal are as follows :

"The court erred in giving the instructions to the jury which were excepted to by the defendant, and also erred in refusing to give the instructions requested by defendant, by reason of which the jury were induced to render a verdict contrary to law and contrary to the evidence."

A. S. HIGGINS and S. HEYDENFELDT, for appellant, the defendant below.

TUTTLE & HILLYER, for respondent.

By the Court, SANDERSON, C. J.

We can not notice the argument of counsel for appellant as to the sufficiency of the evidence to sustain the verdict, nor as to the question of costs, nor the correctness of the decree for an injunction, because they are not embraced in the grounds of appeal set forth in the statement: *Barrett et al. v. Tewksbury*, 15 Cal. 354; *Reynolds v. Lawrence*, 15 Cal. 359. Under the rule laid down in those cases, we can only consider the points made upon the instructions given and refused by the court.

Nor do we deem it necessary to notice in detail the instructions of which the appellant complains. It is sufficient to say, that after a careful examination we are satisfied they correctly present the law applicable to the facts, and to the legal effect of which they are addressed.

As to the instructions asked for by the defendants: The first was properly refused because it is so broad and unqualified in its terms that it might have misled the jury. As an abstract proposition, even, it is too general, because it ignores entirely the idea of prior vested rights in others, to which the right claimed by defendant might be subordinate; and as applicable to the particular facts of this case, it ignores entirely the prior rights of the plaintiff, and by necessary implication negatives the idea that he had any such rights, thus striking from under it the very foundation upon which his cause of action rested, although such rights were conclusively established by the testimony.

The second instruction is undoubtedly law, but it had already been twice given in substance, and that was doubtless the reason why it was refused.

The four remaining instructions refused by the court are founded upon the theory that in the mineral districts of this State, the rights of miners and persons owning ditches constructed for mining purposes are paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition; thus annihilating the doctrine of priority in all cases where the contest is between a miner or ditch owner and one who claims the exercise of any other kind of right or the ownership of any other kind of in-

terest. To such a doctrine we are unable to subscribe, nor do we think it clothed with a plausibility sufficient to justify us in combating it.

The judgment is affirmed.

JAMES L. McDONALD, WILLIAMSON GRAHAM AND
JOEL STODDARD V. BENJAMIN ASKEW, SR., BENJAMIN
ASKEW, JR., AND A. ASKEW.

(29 California, 201. Supreme Court, 1865.)

Water—Use for mill purposes. The interest in water acquired by one who locates on the bank of a stream and appropriates the waters of the same for machinery, is not property in the water as such, but the right to the momentum of its fall at the point of location, and to the flow of the water in its natural course above.

Intervening appropriation of water. If one who has appropriated a part of the water of a stream to propel machinery at a point on the same, makes a conveyance of all his interest in the water of the stream to one who has a ditch above, he does not thereby lose his prior right to the water which flows down after the sale, as against one who appropriated the water of the stream below him after his appropriation, but before his sale.

Sale of water by mill-owner. A person who has built a mill on a stream and appropriated a part of its water to propel machinery, does not lose his prior right over one who has claimed the water below him for mining purposes, by a sale of his interest in the water of the stream to be used in a ditch above.

Appeal from the District Court of Yuba County, Tenth Judicial District.

The plaintiffs' grantors, in the beginning of 1850, erected a mill on the banks of Bear River, and appropriated water from the stream to propel its machinery. Afterward, defendants located a mining claim below the mill, and erected a dam to turn the water of the stream onto the bank to work the claim. Plaintiffs complained that the backwater from the dam impeded their water-wheel.

The other facts are stated in the opinion of the court.

J. L. ASHFORD and G. N. SWEZY, for appellants, who were plaintiffs below.

W. C. BELCHER and J. O. GOODWIN, for respondents.

SHAFTER, J.:

This is an action to restrain the defendants from erecting a dam across Bear River, whereby, as the complaint alleges, the water of the river will be impeded in its usual current and flowed back upon the wheel of the plaintiffs' flouring mill, thereby preventing the running of said mill, to the irreparable damage of the plaintiffs.

The defendants, by a supplemental answer, filed by leave of the court, admitted that the plaintiffs, at the commencement of the action, were the owners and entitled to the use of the water at their mill to the extent of one thousand inches and no more; but they averred that pending the action and on the 17th of December, 1862, the plaintiffs "conveyed by deed to the Bear River and Auburn Water and Mining Company all the waters of Bear River to the capacity of the water ditches and works of the said company, to wit, the water ditch known as the Bear River and Auburn Water and Mining Company's Ditch, and the water ditch known as the Gold Hill Ditch. That the capacity of the ditch first named, on the day the deed was executed, was more than two thousand inches, and the capacity of the Gold Hill Ditch one thousand inches. That both said ditches take the waters of the said river from the channel thereof at points more than ten miles above the plaintiffs' said mill. That the plaintiffs claimed and owned the said one thousand inches by virtue of a location and appropriation in or about the year 1849 or 1850 and prior to the construction of the dam of the defendants and the location and appropriation of the waters of said river by them for mining purposes, which event took place in 1853. That at all times since the said sale and conveyance of the waters of Bear River on the 17th of December, 1862, the Bear River and Auburn Water and Mining Company have taken out and diverted from the river, at the heads of their said ditches, and more than ten miles above the plaintiff-

iffs' said mill, all the waters of the river to the full capacity of the ditches, and at all times and seasons since the said date much more than one thousand inches, the amount to which plaintiffs were entitled by virtue of their prior appropriation. That the Bear River and Auburn Water and Mining Company, by means of their said ditches, conduct the waters a long distance away from the river and so use and appropriate the same that no part thereof, or if any, very little, and less than one hundred inches of the same, is returned or comes back to the channel of said river at or above the mill of the plaintiffs or the dam of the defendants."

The trial was by the court, who found that the admitted prior right of the plaintiffs was limited to one thousand inches. That thereafter and prior to the commencement of the action, the defendants located a mining claim below the plaintiffs' mill, and erected a dam across the river for the purpose of raising and running the water upon their mining ground. That pending the litigation, the plaintiffs conveyed to the Bear River and Auburn Water and Mining Company, all their right, title, and interest in and to the waters of Bear River, or sufficient thereof to fill the ditches of the company, and that the ditches are of greater capacity than the amount claimed by the plaintiffs. That during a large portion of the year the Bear River Company use almost the entire volume of the water of the river, but that below their dams and above the plaintiffs' mill, there are some small tributaries coming to Bear River, sufficient to run the mill, even at the low stage of the water, a portion of the time. That at the lowest stage the water of the said tributaries and waste water from the said ditches amounts to seventy-five inches, and that the mill can run one stone upon seventy inches.

The court considered that the plaintiffs, "by the sale of their water, and all of it, to the Bear River Company, had lost their prior right; and if they then laid a new claim to the use of the surplus water of Bear River, it being later in time, the claim must be subservient to the claim of defendants for their mining purposes; and their claim is to raise their dam to the height of five feet. This claim of defendants is prior in right to any new claim of water made by plaintiffs subsequent to the sale of their original right of use,

and this claim they are entitled to use in any legitimate manner, with all its incidents. It is true, even a legitimate and reasonable use by defendants of their claim may work an injury to the plaintiffs; but whatever rights the plaintiffs now have to the use of the water in the running of their mill must be subject to the now prior rights of defendants." On these views, judgment was entered for the defendants, dissolving the temporary injunction and dismissing the suit with costs.

It will be observed that the reasoning proceeds upon the assumption that the rights which the plaintiffs had acquired by reason of their location and appropriation in 1849-50, passed to the Auburn Water and Mining Company by the deed of December 17, 1862; and if such was the fact, the conclusion at which the court arrived may, for the purposes of this hearing, be taken as correct. But we do not consider that the subject-matter of the conveyance was identical with the rights vested in the plaintiffs, and for the protection of which this suit was instituted.

In the first place, the interest of the plaintiffs in the waters of Bear River related to the point where their dam was built and where the mill stood; while the interest conveyed related to a point where the then existing ditches of the grantees tapped the river ten miles above. That which the plaintiffs parted with is not identical, then, with that which they had, in the matter of location or position.

Interest acquired in water by appropriation, or purchase and sale of the same.

But, further, the interest vested in the plaintiffs, and the interest conveyed by them, differ in essential nature. The interest acquired by the plaintiffs through their prior location was not a property in the water as such *Eddy v. Simpson*, 3 Cal. 251; *Kidd v. Laird*, 15 Cal. 179, but a right to the momentum of its fall at the point where the stream was crossed by the dam, and to the flow of the water in its natural course above as subservient to that end: *Kelly v. Natoma Wat. Co.*, 6 Cal. 108; Ang. W. C. 91, 96. The subject-matter of the conveyance made by the plaintiffs was not water power, but water as such; or the right to divert water up to the capacity of certain existing ditches to receive it. If the

proper data were given, the amount of water which the grantees thus acquired the right to divert might be stated in cubic feet or in gallons. A grant may be of a certain quantity of water; for instance, for as much as would pass through a pipe or floodgate, or a sluice-way of certain dimensions; or it may be of a certain extent of water power, as much and no more as is required to operate certain machinery. This distinction is as obvious as it is important: *Miller ex parte*, 2 Hill, 418; *Bardwell v. Ames*, 22 Pick. 333; *Kennedy v. Scovil*, 12 Conn. 317. In *Mayor, etc., v. Commissioners of Spring Garden*, 7 Barr, 348, it appeared that the legislature of Pennsylvania granted the privilege of all the water power of the River Schuylkill, and made a subsequent grant to the District of Spring Garden and Northern Liberties of the right to erect works and supply their inhabitants with water from the river, and it was held that the grant and the acts done thereunder were not in derogation of the right under the previous grant of the water power. Said Mr. Chief Justice Gibson: "A grant of a water power is not a grant of the water for anything else than the propulsion of machinery; and it consequently does not exclude the use of it by any one else, in a way which does not injure or decrease the power. A right may doubtless be granted, if a grant were necessary, to intercept running water and confine it in reservoirs for separate use; but the grant of such right would not be the grant of a water power. No two things can be more distinct and dissimilar."

But notwithstanding the interest transferred to the Auburn and Bear River Water and Mining Company by the deed of December 17, 1862, was not the identical interest held by the grantors; still, if it appeared as matter of fact that a full exercise of the right conferred by the deed, would make the water power of the plaintiffs completely valueless, the judgment would have been free from objection; for in such case the element of irreparable damage would have been wanting. But it appears by the findings that there are tributary streams entering the river between the head of the ditches named in the deed to the Auburn and Bear River Water and Mining Company and the dam of the plaintiffs, ten miles below; and that when the water is at the

lowest stage, "there are seventy-five inches of water passing down the stream, being waste water from the ditches above, and the water of Wolf Creek, a tributary of Bear River, coming in below the dams of the mining companies above," and that the mill "can run one stone upon seventy inches of water." If the plaintiffs' water power stands thus when the season is at the driest, we can not doubt that in the wet season its efficiency is impaired much less by the exercise of the rights which passed by the deed, and perhaps not at all. The idea that this residue of power is held by the plaintiffs by newly acquired right, dating from the execution of the deed to the water and mining company, and that it is therefore subservient to the elder right of the defendants, is not only opposed to the view already taken—that the right of the plaintiffs, acquired in 1849, was neither transferred specifically by the deed of 1862, nor rendered valueless by a full exercise on the part of the grantees of the rights acquired under it—but proceeds upon a misconception of the nature of the plaintiffs' interest. We have already given our views on the question of its character, and have only to add that the plaintiffs had a prior right to the use of all the waters in Bear River, from its springs down, in so far as such use might be necessary as a means to accomplish certain results at the dam. The "water power" to which the plaintiffs were entitled at that point was the principal thing owned by them, and its enjoyment was not dependent upon any given section of Bear River, nor upon any given fraction of its waters. The streams entering the river between the plaintiffs' dam and the heads of the ditches referred to in the deed of 1862, and the drainage generally of that intermediate section, stood in the same relation to the plaintiffs' water power at the dam as the drainage above the heads of the ditches. The original right of the plaintiffs to the drainage between the ditch heads and the dam is obviously unaffected by the deed, and their right to the drainage of the water sheds of Bear River above that point is unaffected by it also, except as it clothes the grantees with the right to dip or pump out, or lead away, at that point an ascertained or ascertainable amount of water. The prior right of the plaintiffs is now on foot, and the only effect of the conveyance is to subject the right to the hazard of being less beneficial to the

plaintiffs throughout the year, or perhaps in the dry season only, than it would have been had the deed not been given. The case stands as it would if the grantees in the deed had tapped the river at the ten mile point, and drained it to the capacity of their ditches, for a period of five years, without the consent and adversely to the plaintiffs. The right acquired by such adverse possession, however it might be a clog upon the beneficial use of the water below, would in no sense involve the plaintiffs' prior right as such; nor does it follow necessarily that its beneficial enjoyment would be at all impeded. Under the state of facts which we are now considering argumentatively, it is apparent that the defendants herein could not say that the plaintiffs' prior rights, as against them, were at an end, and that whatever rights the plaintiffs might have to the flow of the water were newly acquired and junior to their own. A record presenting the state of facts here suggested would be like the one now before us in every substantial particular.

It seems to be conceded that the plaintiffs are entitled to judgment for the specific relief prayed for in the complaint, should the special answer be held to be invalid; but inasmuch as it appears, by admission in the supplemental bill, that the dam, if raised no higher than four feet above the original bed of the stream, would be of no prejudice to the plaintiffs, and inasmuch as the defendants in their answer to the supplemental complaint aver that the dam might be raised to a still greater height without any detriment to the superior rights of the plaintiffs; and inasmuch as the question of fact involved does not appear to have been passed upon by the court below, we can not enter a judgment determining the rights of the parties with proper exactness. On this state of the record, we can do no more than reverse the judgment and award a new trial.

And it is so ordered.

GOTTSCHALL ET AL. V. MELSING ET AL.

(2 Nevada, 185. Supreme Court, 1866.)

Notice alone, not a sufficient appropriation. A mere notice of intention to appropriate a portion of the public domain for mining purposes, has generally been held a sufficient appropriation until the proper season arrives for working the claim, but a party can not, by mere notice, take up and hold a claim for five years without any intention of working it unless water is brought to the district by artificial means.

Statute of limitations. The benefits of the statute of limitations may be secured without a special plea by defendants, when the complaint is silent as to the foundation of the right sought to be enforced.

Appeal from the District Court of First Judicial District.
Judgment for defendants, and plaintiffs appeal.

The opinion states the case.

PITZER & KEYSER, for appellants.

HILLYER & WHITMAN, for respondents.

Opinion by BEATTY, J., LEWIS, C. J., concurring specially in the judgment.

This was an action in the nature of an action of ejectment, brought by the plaintiffs in the month of October, 1865, to recover possession of a considerable tract of land in the center of the town of Gold Hill.

The property sued for contains a large number of houses, mills, etc., of great value in that town. The plaintiffs, to sustain their cause, proved that they and their grantors (two of the present plaintiffs being original locators, and a third a grantee of one of the original locators) located a mining claim in 1859. That claim as located was 900 by 400 feet, and included the property in controversy. The location was made by putting up a notice of the claim and sticking up a post at each corner of the parallelogram. Subsequently, it was ascertained this location interfered with a mining location of older date. The boundaries were then so con-

tracted as to leave out the portion interfering with the older location.

The plaintiffs then went to work and prospected the claim, working on it at intervals from September, '59, to December, '60, both inclusive.

The result of this prospecting was to show the ground moderately rich in gold, so rich that it would have been a valuable mining location if water had been obtainable. But in the absence of water, which the country does not afford in its present state, the ground was worthless for mining purposes. The claim, therefore, was not worked, and the parties ceased to occupy or use it in any way, but avowed their intention of holding on to it, to be worked at a future day in the event water was brought by artificial means to the district, and to be had in sufficient quantities for mining purposes. At the time this location was made there were one or two cabins on it occupied by others than the locators. Since its location, there has never been water enough to work the claim except at one time, which was during the winter of 1861, which was a remarkably wet winter. Then as the water only lasted a short time, it was not available for mining purposes. Since the location of this piece of ground for mining purposes the main street of Gold Hill has been run through it, and it is compactly built up with houses for its whole length.

Whilst this ground was being built up, the plaintiffs occasionally gave notice to those who were improving that they claimed it for mining ground, and expected to occupy it and mine it if ever water was brought in.

Upon the plaintiffs resting, the defendants asked for a nonsuit. The court granted it, and plaintiffs appeal.

Whilst we can not fully concur with the judge who wrote an opinion sustaining the nonsuit in all the views which he expresses, we are perfectly satisfied with the result at which he arrived. We are satisfied the nonsuit should have been granted. The judge who tried the cause in the court below seems to think the plaintiffs showed a good and subsisting right to mine the ground in controversy in case water should at any future time be brought into the district. But he holds that the right to mine in the ground and extract the precious metals therefrom gives only a qualified right of pos-

session to the miner: that others have a right to occupy ground which has been appropriated for mining purposes, so long as such occupation does not interfere with the free use of the ground for mining operations: That as this ground can not at present be used for mining purposes, because of the want of water, the occupation of it by others is not an infringement of the rights of the miners, and therefore they have *at present* no right of action.

We can not see that the miner stands in any different relation to the government from that occupied by others holding possession of any part of the public domain.

All persons settling on the public domain are mere licensees or tenants at will of the government (except in those cases where a party is protected by some pre-emption or homestead law) and we can see no reason why one who appropriates a portion of the public domain for mining purposes is less entitled to the sole and exclusive possession of the ground appropriated than one who appropriates a piece of the same public domain for a garden or a building lot. Indeed, law and custom have given the miner in some respects the advantage over all other appropriators. A mere notice of appropriation or intention to appropriate a certain piece of ground for mining purposes when the proper season arrives, has generally been held to be a sufficient appropriation by a miner, whilst one wishing to appropriate for other purposes can only hold by an actual appropriation and occupation. We are of the opinion the plaintiffs' proof in this case shows they have no right whatever in the premises sued for. Whilst the law facilitates the taking up and holding of mining claims until the proper season of the year arrives for working them, it discourages the holding onto such claims without working them for long and indefinite periods.

The limitation of actions for mining claims is two years. For other actions for the recovery of real estate it is five years. The whole policy of the law is against appropriating the public mineral lands, and holding onto them without work. We do not think a party can go onto the public lands and lay a claim to a portion thereof for mining purposes, prospect the same and then leave it for an indefinite time and still retain his rights therein. Doubtless a miner

may take up a claim and hold it until the proper season of the year arrives for working it, without forfeiting his rights—and if a season of unusual character (a very dry one, for instance) should intervene, he might wait for a second season. But we do not think a party can, by mere notice, take up a mining claim and hold it for five years without work or occupation, and without any intention to ever work it again, except upon the happening of a very uncertain event, to wit: the bringing of water by artificial means to the district.

If there had been some work for the introduction of water into the district progressing at the time the claim was located, or at the time the locators ceased work thereon, there might have been some reason for suspending work on the mining claim, and awaiting the advent of water. But when no such work was in progress, and no certainty that any such ever would be commenced, it would be altogether unreasonable to withhold the use of the land from other profitable employment because of a mere possibility that the mining locator might, at some future and distant day, be able to use it for mining purposes.

Again, if there were no other objections to plaintiffs' claim, it is clearly barred by the statute of limitations. It may be objected that the statute of limitations was not pleaded, and is therefore not available to the defendants. The more modern rulings of courts seem to favor the statute of limitations, and allow of its becoming a defense without being specially pleaded. It has been held in some cases that a general demurrer will be sustained to a complaint which shows on its face that a claim sued for is barred by the statute of limitations. In this case, whilst plaintiffs' evidence shows they rely exclusively on a mining right claim which is barred by a limitation of two years, the complaint is silent as to the foundation of the right sought to be enforced, so that the defendants could not know, from anything contained in the complaint, that a limitation of less than five years applied to this action. Consequently, it was not the fault of the defendants' pleadings that the statute was not pleaded.

Under such circumstances the defendants were evidently entitled to either one of two things. They were entitled to all the benefits of the statute of limitations without a special

plea of the statute, or, upon the close of the plaintiffs' testimony, they were entitled to amend their answer so as to set up that defense. Neither party should be allowed to obtain an unfair advantage by the concealment and suppression of facts. The defendants were entitled to every indulgence from the court in making good their defense, because the plaintiffs attempted to evade the law of limitations by concealing the foundation of their claim, and only developing the real nature of the action when they introduced their testimony; and because the claim was a stale one and not founded upon any just or equitable right, but a speculative attempt to deprive innocent parties of their labor and capital invested, without any just compensation.

The judgment of the court below is affirmed.

SMITH V. O'HARA ET AL.

(43 California, 371. Supreme Court, 1872.)

Division of water by alternate use. If the first appropriator of the waters of a stream only appropriates a part, another person may appropriate the residue; or one may appropriate for certain days or months, and another for other specified times. There is no difference in principle between appropriations of water, measured by time, and those measured by volume.

Evidence of sale of ditch. The sale of a ditch can not be proved by oral testimony, but only by deed.

Appeal from the District Court of Tuolumne County, Fifth Judicial District.

Suit for damages, with prayer for perpetual injunction restraining defendants from using the water flowing in Woods' Ditch.

The plaintiff complained that he and his grantors had, since 1851, owned and appropriated eighty-four inches of the night and Sunday water in Woods' Creek, and the same quantity of day water excepting the first twenty-five inches, and that defendants had diverted the same.

Defendants were using the water in Woods' Creek for mining purposes, and claimed that they had located their claims before plaintiff had appropriated the water in his ditch.

The court instructed the jury as follows:

"That if, at the time Woods constructed his ditch, the waters of Woods' Creek had to a certain extent been used by miners at work in the bed and banks of said creek in the working of their mining claims, they making no claim to the use of the waters of said creek on Sundays or in the night time, then Woods might, during Sundays and the night time, take for his own use, for a useful purpose, the waters of said creek, and turn them into his ditch, to be used elsewhere than in the bed or banks of said creek; and if you believe, from the evidence, that such use and appropriation of the waters of Woods' Creek was acquiesced in by the said miners, Woods and the miners mutually using the waters of said creek in the manner and at the times indicated, then Woods, by such appropriation, followed by a continued use of the same, would acquire such a right to the use of the waters of said creek during Sundays and night time as would forbid the said miners, without his consent, from taking for their use the waters of said creek during Sundays and night time, when by such taking they should deprive Woods of the use of the waters by him so originally taken and continuously used, for a useful purpose, during Sundays and night time."

The defendants excepted to this charge.

The court then submitted the following special issues to the jury, which, after they had retired, they answered as follows:

"1st. To how many inches of water is plaintiff entitled of the waters of Woods' Creek during the night time and Sundays, as against defendants in this action?

"Answer—Eighty-four (84) inches.

"2d. To how many inches of water of Woods' Creek were the miners in Woods' Creek entitled in the day-time, prior to any appropriation of the waters of Woods' Creek by the plaintiff?

"Answer—Twenty-five (25) inches.

"3d. After allowing for the amount of water of Woods' Creek to which you may find the miners of Woods' Creek

entitled as against plaintiff, to how many inches of water is plaintiff entitled as against the defendants?

"Answer—Eighty-four (84) inches.

"4th. Did the defendants, between the 1st day of October, 1868, and the 25th day of June, 1869, deprive the plaintiff of the use of any water to which he was entitled as against the defendants?

"Answer—Yes.

"5th. If defendants have deprived the plaintiff of the use of any water to which he was entitled, what damage has plaintiff sustained by reason of such acts of defendants?

"Answer—One hundred and four (104) dollars."

The court rendered judgment for the plaintiff, and enjoined the defendants from appropriating the night and Sunday water to the extent of eighty-four inches, and any of the day water to the extent of eighty-four inches, after they had first taken out twenty-five inches. The defendants appealed.

The other facts are stated in the opinion.

CALEB DORSEY, for appellants.

EDWIN A. RODGERS, for respondent.

By the Court, RHODES, J.

It is not to be doubted that the person who first appropriates for mining or other purposes, the waters of a stream running upon the public lands, is entitled to the same, to the exclusion of all subsequent appropriations by other persons for the same or other purposes. The defendants do not question this doctrine, but deny its application to this case.

The court instructed the jury, in effect, that if the miners who were using the waters of the creek, made no claim to the use of the waters during Sunday and in the night time, another person might appropriate the water, during such time, to his own use; and if he did so appropriate and continuously use the waters, the miners could not thereafter deprive him of the use of the waters during those times, to the extent to which he had appropriated them. The jury

found that the plaintiff was entitled to eighty-four inches of the water of Woods' Creek during the night time and Sundays, as against the defendants. It results from the proposition first stated, that if the person who first appropriates the waters of a stream only appropriates a part, another person may appropriate a part or the whole of the residue; and when appropriated by him his right thereto is as perfect, and entitled to the same protection as that of the first appropriator to the portion appropriated by him. In *Ortman v. Dixon*, 13 Cal. 34, it was decreed that the defendants were entitled to the waters of the creek for the use of their mill; that the plaintiffs were then entitled to sufficient water to fill their ditch, No. 2; and that the defendants were next entitled to the residue to fill their ditch, No. 3. The cases are very numerous which affirm, or assume without question, this doctrine. It is usually the case that the amount of water to which the several persons claiming its use are entitled, is measured by inches, according to miners' measurement, or by the capacity of the ditches through which it is conducted from the stream, but there is no reason why the amount may not be measured in some other mode. They hold the amount appropriated by them respectively as they would do had the paramount proprietor granted to each the amount by him appropriated. The right to use the waters, or a certain portion of them, might be granted to one person for certain months, days or parts of days, and to other persons for other specified times. An agriculturist might appropriate the waters of a stream for irrigation during the dry season, and a miner might appropriate them for his purposes during the remainder of the year. And so may several persons appropriate the waters for use during any different periods. There is no difference in principle between appropriations of waters, measured by time, and those measured by volume.

The plaintiff adduced no written evidence of the transfer to himself of the right to the ditch through which were conveyed the waters claimed by him, from those who had constructed it, or been in possession of it, but he proved by oral testimony that it was sold to him by Woods, the person, or one of the persons, who had constructed and used it. This evidence was properly stricken out by the court. But

the court, in instructing the jury in respect to the appropriation and use of the waters of the creek, charged them in respect to the relative rights of *Woods* and the miners who used the waters of the creek. This was calculated to mislead the jury, by giving them the impression that the plaintiff had succeeded to the rights of *Woods*. The instruction, in that respect, was erroneous, and the defendants, in order to correct that erroneous impression, were entitled to have the instruction given which was asked by them, to the effect that the plaintiff could not connect himself with the rights acquired by *Woods* and *Sedgwick* except by deed. We can not say that this error did not injure the defendants, for it can not be ascertained from the record whether the jury found for the plaintiff upon his own appropriation and use of the waters, or upon that of *Woods* and *Sedgwick*.

Judgment and order reversed, and cause remanded for a new trial.

WOOLMAN ET AL. V. GARRINGER ET AL.

(1 Montana, 535. Supreme Court, 1872.)

Law and equity jurisdiction. The organic act of Montana clothes the Supreme and District Courts with both common law and chancery jurisdiction, but in judicial proceedings the distinctions between law and equity must be maintained, and the court can not lawfully exercise both of these separate functions in the same proceeding. Hence a trial by jury, with verdict and judgment for damages, coupled with a decree enjoining defendants from using certain water, is a proceeding which partakes both of the nature of law and equity, and is irregular and illegal throughout.

Change of the place where water is used. The prior appropriator of water has the right to change the place of use and divert the water to any other point, to the extent of his appropriation. Appropriation, use and non-use, are the tests of his right; and place of use and character of use are not.

The doctrine of relation applied. When the work of constructing a ditch is pursued with reasonable diligence, the date of appropriation relates back to the commencement of the ditch.

Notice. Notice of appropriation posted along the stream, combined with the continued prosecution of the work, was sufficient to charge plaintiffs with notice of defendants' claim.

Waste water. The right acquired by the appropriation of waste water from defendants' ditch is subordinate to that of the first appropriator, and liable to be determined at any time by his action, unless the water had been returned into its original channel, without any intention of recapture.

Appeal from the District Court of Lewis and Clark County
Third Judicial District.

The defendants excepted to certain instructions given by the court below, which were as follows:

"The plaintiffs are not required to take notice of the intention of the defendants to carry or convey the waters of the said gulch beyond the point specified in the notice, unless such intention was indicated by such acts as would convey to a reasonable person notice of such intention, or actual notice given to them, prior to acquiring any intermediate rights.

"The record notices introduced of defendants' claims to the water in controversy are not notice to plaintiffs by reason of being recorded, and it devolves on defendants to show actual notice of such record, or actual execution of the work described in it, prior to any intermediate rights plaintiffs, or their predecessors, may have acquired to the water in controversy in order to affect the plaintiffs with such notice.

"If the jury believe, from the evidence, that plaintiffs, or their predecessors in interest, were not notified of the defendants' intention to carry the water in controversy out of the natural channel of the stream to some point designated, and that the defendants had done no act sufficient to indicate to a reasonable person such intention, and that the plaintiffs, or their predecessors in interest, took up said water after it was returned to McClellan Gulch, and carried and conveyed the same in and upon their ranches for some useful purpose, then said defendants have no right thereafter to so change or divert said water as to deprive the plaintiffs of the use thereof.

"If the jury do not believe, from the evidence, that the defendants did such acts as would convey to a reasonable person a notice of their intention to convey the waters of McClellan Gulch to such point as would not reach plaintiffs' ditch, then it devolves upon said defendants to show an actual notice to said plaintiffs of their intention so to carry the same, prior to plaintiffs' appropriation.

“ If the jury believe, from the evidence, that the defendants conveyed the water in controversy to what is known as Union Bar, or McClellan Gulch, and permitted the same to flow back into said gulch without giving the plaintiffs, or their predecessors in interest, any notice of their intention to carry it elsewhere, and that their acts and works did not indicate to a reasonable person an intention to carry it elsewhere, and that said plaintiffs, or their predecessors in interest, before such notice or acts, appropriated and took possession of the waters so returned to said McClellan Gulch, then defendants have no right thereafter to divert said waters from plaintiffs.

“ If a person appropriates water to be used at a particular point, and there uses it, and then permits it to flow back into its natural channel and go on down its accustomed course, persons below may appropriate the same so as to make it a vested right, and no subsequent change of the prior appropriation can be made so as to deprive such appropriators of the use of such water.

“ If the jury believe, from the evidence, that the defendants had no ditch, or survey for a ditch to the stream of water in dispute, and also that they had no notice or marks upon said stream indicating an intention to appropriate it and carry it to a point where it would not flow back into the natural channel of said stream above the point of plaintiffs' appropriation, at the time plaintiffs' predecessors in interest made the appropriation of said water, then you will find for the plaintiffs in the number of inches they are entitled to, and such damages as they have proven they have sustained, not exceeding the sum of \$5,000.”

The other facts appear in the opinion.

W. F. SANDERS, W. E. CULLEN and G. G. SYMES, for appellants, who were defendants below.

SHOBER & LOWRY and E. W. TOOLE, for respondents.

MURPHY, J.

This is an appeal from the judgment-roll, in an action for damages, for the diversion of water, and for an injunction, united in the same complaint, tried to a jury, and judgment for damages and a perpetual injunction.

The jury returned a general verdict for \$250 damages, in

favor of the plaintiff, and, also, findings on the special issues submitted.

Thereupon, both parties filed motions—the plaintiffs for judgment and decree, and the defendants to set aside the general verdict, and for judgment upon the special findings.

Both motions were heard together, and the defendants' overruled, and the plaintiffs' sustained, and, accordingly, judgment based upon the general verdict for \$250 damages rendered, and a decree, based upon the pleadings, general verdict and special findings, for perpetual injunction entered, in favor of the plaintiffs and against the defendants.

To this action of the court, as also to the ruling out of certain testimony, and the refusal and giving certain instruction to the jury, defendants, by counsel, excepted and appealed to this court.

The first inquiry that naturally and properly arises here is as to the regularity and legality of the proceedings in the court below, and involves the question of jurisdiction.

The proposition, that law and equity can not be blended in the same suit or action, under our organic act, was elaborately discussed and definitely settled in the case of *'Gallagher et al. v. Basey et al.*, by this court, at its January term, 1872.

Upon the strength of that decision and the authorities upon which it is based, and the general principles of law governing, we hold:

1. That the organic act, in clothing the Supreme and District Courts of the Territory with both common law and chancery jurisdiction, confers them as separate powers and distinct jurisdictions.

2. That in judicial proceedings, in pursuance thereof, the well known and recognized distinctions between law and equity must be maintained, and the peculiar and characteristic features of these different jurisdictions preserved, and they exercised separately and not together.

3. That it is within the province of the local statute to regulate or limit and control the forms of proceedings, in actions at law and suits in equity, but not within the scope of its authority to destroy or blend together, in the same proceeding, the two jurisdictions.

¹ Post, 683.

4. That actions at law, where legal remedy is demanded, must be tried as at law, and the judgment based upon the verdict of a jury, or the findings of the court sitting in the capacity of a jury.

5. That suits in equity, where equitable relief is prayed, or where an equitable defense is set up to a claim at law, must be tried as in a court of chancery, and the decree emanate from the judge sitting as a chancellor.

In the case at bar both legal and equitable relief is sought, and both the law and chancery powers of the court are invoked.

In the same complaint both damages at law and an injunction enjoining in equity, are asked.

While it purports to be an action brought on the law side of the court for damages, yet it seeks relief by restraint on the equity or chancery side also.

And in this condition it was tried to a jury as at law, and a judgment rendered upon the general verdict of a jury, for \$250 damages for the plaintiffs, and, at the same time and in the same connection, a decree entered perpetually enjoining and restraining the defendants.

The court could only consistently and lawfully exercise but one of these separate functions or distinct jurisdictions in the same proceeding, and that only when properly invoked.

The proceedings are neither in conformity to the established principles and rules governing in law or in equity, but seem to partake of the nature of both, and are irregular and illegal throughout.

And for these reasons, if there were no others, the case will have to be reversed.

And here the matter might rest were it not for the fact that another and very important question presents itself, which it is considered advisable to notice in this connection.

It relates to the effect on the right of the appropriator of water of a change in the *place* of use of the water appropriated.

From the record it appears that on the 4th of June, 1866, the defendants and their predecessors in interest, by means of a dam, ditch and a posted notice at the point of appropria-

tion, and about four miles above the mouth of the creek, did appropriate one thousand inches of the water of McClelland Creek, in Jefferson county, Montana Territory, for mining purposes.

And it also appears, that afterward, in September of the same year, plaintiffs, by means of a dam and ditch, about a mile below the point of defendants' appropriation, did likewise appropriate two hundred inches of the water of said creek.

And it further appears, that defendants, by means of their said ditch, from the 30th day of June to the 4th day of July, 1870, did divert the water of the creek aforesaid from the head of and away from the plaintiffs' ditch.

And of these facts there is no controversy, and upon the appropriations, as above stated, the parties base their respective claims.

The record also shows that "there was no proof introduced tending to show," "nor" that "it was claimed on the trial that either right of either party had been abandoned." And further, that "it was proven and conceded that the defendants' appropriation of the water was prior, in point of time, to the plaintiffs', to the extent of one thousand inches; but the plaintiffs claimed that, as they, the defendants and grantors, had not carried the water away, or given notice of their intent to carry it away from the head of plaintiffs' ditch, until after plaintiffs' grantors' appropriation, that, therefore, they could not thereafter do so."

And this is the proposition upon which the plaintiffs rested their case, and which we propose to briefly consider for the purpose, if possible, of settling the law in that regard so far as this Territory is concerned.

The case seems to have been tried and determined upon the theory that the water was not carried away from the point where the plaintiffs' ditch tapped the stream, or that there was no actual *notice* brought home to plaintiffs of such intention to carry it away before their subsequent appropriation.

The facts are, water was not carried away till after the dam and ditch of plaintiffs were constructed, nor does it appear that any notice, other than that of the general appropriation for mining purposes, was even given, except it be such as the acts of the defendants themselves might have indicated to the

mind of a reasonable person. And it is not claimed that they did not follow up the construction of their ditch with proper diligence.

We are constrained to believe that all this was not necessary, and that the defendants had the right, under the circumstances, to change the place of use and divert the water to any other point, to the extent of their appropriation.

In the case of *Maeris v. Bicknell*, 7 Cal. 261, the court said: "The next question which arises in this case is, whether a party who makes a prior appropriation of water can change the *place* of its use without losing that priority, as against those whose rights have attached before the change. This question, we think, can admit of but one answer. It would seem clear that the mere change in the *use* of water from one mining *locality* to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the right of the party. It would destroy the utility of such works were any other rule adopted."

And in the case of *Davis v. Gale*, 32 Cal. 26; this rule is not only confirmed, but the court goes still further and lays down another equally wise and important rule, that a prior appropriator may even change the *use* for which he first appropriated the water without losing his right of priority, as against a party whose subsequent appropriation was made before the change took place.

In the language of the learned judge who delivered the opinion of the court in that case, "a party acquires a right to a *given quantity* of water by appropriation and use, and he loses that right by non-use or abandonment. Appropriation, use and non-use, are the tests of his right, and place of use and character of use are not. When he has made his appropriation, he becomes entitled to the use of the *quantity* which he has appropriated at *any place* where he may choose to convey it, and for *any useful* and *beneficial purpose* to which he may choose to apply it. Any other rule would lead to endless complications and most materially impair the value of water rights and privileges.

"Thus, a party may appropriate water, in the first instance, for the purpose of placer mining, and when his ground is worked out, or he finds it will not pay, or that ground further

on is better, he may leave the former and carry the water to the latter without losing his priority.

“Or he may find paying quartz, and change the use of his water from fluming or sluicing into a motive power for crushing his quartz, without forfeiting his prior right.

“And so he may in the first place tap a stream for the purpose of running a saw-mill, and after the timber is exhausted, or he finds that a grist or any other kind of a mill will be more profitable, he may change the use from one purpose to the other and to a different point, if necessary, without surrendering or impairing his right of priority.

“These water rights are frequently secured by and attended with the expenditure of large sums of money, and to limit them to the *particular place* or the *special purpose* in view of which they were first sought and acquired, by such a harsh and arbitrary rule of law, would be manifestly unjust and seriously deleterious in its results, and greatly embarrass and retard the development of the resources of the country.”

We agree with the view expressed in the case of *The Union Water Company v. Crary*, 25 Cal. 509, that the right of the first appropriator may be lost in whole or in part by adverse possession, under the statute of limitations. But in this case no adverse possession is contended for nor is the statute of limitations pleaded or relied upon by the plaintiffs.

And from the record it appears that the defendants pursued the work on their ditch, which is some twenty-seven miles long and cost about \$50,000, with such reasonable diligence as would undoubtedly make the appropriation date and relate back to the commencement of the same, even were abandonment claimed and insisted upon.

The notices posted on the stream, of the appropriation of so much water for general mining purposes, and the immediate entering upon the continued prosecution of the construction of the dam and ditch, and its extension or branches, were sufficient to put the plaintiffs on their guard and to apprise them of the prior appropriation of the defendants and of their superior rights in the premises. And from these facts they were bound to take and were charged with notice of the defendants' prior appropriation, and if they then proceeded it was at their own option and peril.

Nor were the defendants required to take notice of any subsequent appropriation by the plaintiffs, nor to give notice that they intended to reclaim the waste water from their mining operations, and that plaintiffs could not always use the same.

The plaintiffs could acquire no other than a mere privilege or right to the use of the waste water, or at most, but a secondary and subordinate right to that of the first appropriators, and only such as was liable to be determined by their action at any time, unless the water had been turned back into the original channel after it had been used and answered the purposes of the first appropriators, without any intention of recapture, and thereby became *publice juris* and subject to appropriation by any one, which does not appear from the record; but clearly the contrary it shows, and was claimed on the trial and proof offered to that effect.

The case is reversed and remanded.

BASEY ET AL. V. GALLAGHER.

(20 Wallace, 670. Supreme Court of the United States, 1874.)

Practice. The defendant having first demurred and subsequently answered, and the record failing to show what was done with the demurer, it will be presumed that it was abandoned.

Law and equity. In Montana the formal distinctions in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed. The findings of a jury in an equity case are merely advisory, and whether the court will follow them depends on whether it is satisfied with the verdict.

Running waters. He who first subjects running water upon the public domain to his use, is regarded as the source of title in all controversies respecting it; and this is equally true whether the water be used for mining or other useful pursuits.

Conflict of laws. The right by priority does not depend upon uniformity in the local laws, state legislation and decisions of courts, but in case of conflict between local custom and statutory regulation, the latter, as of superior authority, must necessarily control.

Appeal from the Supreme Court of the Territory of Montana.¹

¹ *Gallagher v. Basey*, 1 Mont. 457.

Gallagher and others filed a bill in one of the district courts of the Territory against Basey and others praying for an injunction to restrain them from diverting the water of a stream known as Avalanche Creek, to which plaintiffs asserted a right by prior appropriation for irrigating purposes.

They averred that in 1866 they and their predecessors in interest took up certain ranches for settlement and cultivation along the line of said creek in Meagher county in said Territory and had ever since occupied and cultivated the same. That successful cultivation was impossible without irrigation, and that they had in 1867, at great expense, constructed a ditch from said creek to their ranches for that purpose; that at the time said water had not been otherwise appropriated, and that by means of said ditch they appropriated the water to the extent of 500 inches, according to the measurement of miners; that this amount was necessary to the successful cultivation of their ranches, and by means of it they were able to raise valuable crops. They also alleged that after the water had been so appropriated by them, and during the period from 1867 to 1870, the defendants erected dams across said creek above the head of their ditch and thereby diverted and wholly deprived them of the use of said water. They therefore asked to have the defendants restrained by injunction from diverting the water except so much as exceeded 500 inches.

Defendants demurred, but the record does not show what was done with the demurrer. Subsequently an answer was filed which denied the several allegations of the complaint except the one which averred the possession of their ranches by plaintiffs.

Certain questions were afterward submitted to a jury who found that certain parties named White and Torvais, prior to September or October, 1866, had appropriated the water of the creek to the extent of thirty-five inches; that these parties gave plaintiffs the right to connect with their ditch and to enlarge the same; that plaintiffs thereupon increased the capacity of the ditch to 250 inches; that afterward, in 1867, White & Torvais sold their water right and ditch to defendant Stafford; that the defendant Basey had no interest in privacy with the other defendants, and diverted the water for his own use by agreement with plaintiffs that neither of the

other defendants had diverted the water to the injury of plaintiffs previous to the commencement of the action.

Upon these special findings, the defendants moved that the complaint be dismissed; the plaintiffs for a decree in their favor. The court heard the whole case upon the pleadings, evidence and findings, and rendered a decree that Stafford was entitled to 35 inches of water, that plaintiffs were entitled to the next 215 inches of water, and decreed an injunction against defendants from diverting the water so as to prevent a flow to that extent in plaintiffs' ditch.

From this decree an appeal was taken to the Supreme Court of the Territory where it was affirmed; thence this appeal was taken.

The district court in rendering its decree, disregarded certain findings of the jury, and adopted others, and this was approved by the Supreme Court of the Territory, and constitutes one of the errors assigned here.

The correctness of the decree depended in part perhaps upon certain statutes which are referred to with sufficient fullness in the opinion.

Mr. MONTGOMERY BLAIR, for appellants.

Mr. R. T. MERRICK, for respondents.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court as follows:

The record does not disclose what disposition was made of the demurrer to the complaint, but, as an answer was subsequently filed, upon which the parties proceeded to a hearing, the presumption is, that it was abandoned.

By the organic act of the Territory, the district courts are invested with chancery and common law jurisdiction. The two jurisdictions are exercised by the same court, and, under the legislation of the Territory, the modes of procedure up to the trial or hearing, are the same, whether a legal or equitable remedy is sought. The suitor, whatever relief he may ask, is required to state "in ordinary and concise language," the facts of his case upon which he invokes the judgment of the court. But the consideration which the court will give to the questions raised by the pleadings, when the case is called for

trial or hearing, whether it will submit them to a jury or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others. Sometimes in the same action both legal and equitable relief may be sought, as, for example, where damages are claimed for a past diversion of water and an injunction prayed against its diversion in the future. Upon the question of damages, a jury would be required; but, upon the propriety of an injunction, the action of the court alone could be invoked. The formal distinctions in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed.

The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through master's reports or findings of a jury, is merely advisory. Ordinarily, where there has been an examination before a jury of a disputed fact, and a special finding made, the court will follow it. But whether it does so or not must depend upon the question whether it is satisfied with the verdict. This discretion to disregard the findings of the jury may undoubtedly be qualified by statute; but we do not find anything in the statute of Montana, regulating proceedings in civil cases, which affects this discretion. That statute is substantially a copy of the statute of California as it existed in 1851, and it was frequently held by the Supreme Court of that State, that the provision in that act requiring issues of fact to be tried by a jury, unless a jury was waived by the parties, did not require the court below to regard as conclusive the findings of a jury in an equity case, even though no application to vacate the findings was made by the parties, if in its judgment they were not sup-

ported by the evidence. That court only held that the findings, when not objected to in the court below, and the judge was satisfied with them, could not be questioned for the first time on appeal.

The question on the merits in this case is whether a right to running waters on the public lands of the United States for purposes of irrigation can be acquired by prior appropriation, as against parties not having the title of the government. Neither party has any title from the United States; no question as to the rights of riparian proprietors can therefore arise. It will be time enough to consider those rights when either of the parties has obtained the patent of the government. At present both parties stand upon the same footing; neither can allege that the other is a trespasser against the government without at the same time invalidating his own claim.

In the late case of *Atchison v. Peterson*, 20 Wallace, 507, we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream, would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the government by its silent acquiescence had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated and open to general exploration, did in natural justice acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific States and Territories, by their customs, usages and regulations, had recognized the inherent justice of this

principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories, and was finally approved by the legislation of Congress in 1866. The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one.

In the case of *Tartar v. The Spring Creek Water and Mining Company*¹ decided in 1855, the Supreme Court² of California said: "The current of decisions of this court go to establish that the policy of this State as derived from her legislation, is to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner.

In evidence of this, acts have been passed to protect the possession of agricultural lands acquired by mere occupancy; to license miners, to provide for the recovery of mining claims, recognizing canals and ditches which were known to divert the water of streams from their natural channels for mining purposes and others of like character. This policy has been extended equally to all pursuits, and no partiality for one over another has been evinced, except in the single case where the rights of the agriculturist are made to yield to those of the miner where gold is discovered in his land. *

* * The policy of the exception is obvious. Without it, the entire gold region might have been inclosed in large tracts, under the pretense of agriculture and grazing, and eventually what would have sufficed as a rich bounty to many thousands, would be reduced to the proprietorship of a few. Aside from this the legislation and decisions have been uniform in awarding the right of peaceable enjoyment to the first occupant, either of the land or of anything incident to the land."

Ever since that decision it has been held generally throughout the Pacific States and Territories, that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as

¹ 5 Cal. 395; *Post* TIMBER.

well as to enable miners to work their mining claims, and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits—for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual. The act of Congress of 1866 recognizes the right to water by prior appropriation for agricultural and manufacturing purposes, as well as for mining. Its language is: "That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

It is very evident that Congress intended, although the language used is not happy, to recognize as valid, the customary law with respect to the use of water which had grown up among the occupants of the public land, under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the State or Territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority, and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control.

This law was in force when the plaintiffs in this case acquired their right to the waters of Avalanche Creek. There was also in force an act of the Territory, passed on the 12th of January, 1865, to protect and regulate the irrigation of land, which declared in its first section, that all persons who claimed or held a possessory right or title to any land within the Territory on the bank, margin, or neighborhood of any stream of water, should be "entitled to the use of the water of said stream for the purpose of irrigation and making said claim available to the full extent of the soil for agricult-

ural purposes." Another section provided that in case the volume of water in the stream was not sufficient to supply the continual wants of the entire country, through which it passed, an apportionment of the water should be made between different localities by commissioners appointed for that purpose. This last section has no application to the present case, for it is not pretended that there was not water enough in the district, where Avalanche Creek flows, to supply the wants of the country; and the section itself was repealed in 1870.

In January of that year another act was passed by the legislature of Montana upon the same subject, which recognizes the right by prior appropriation of water for purposes of irrigation, and declares that all controversies respecting the rights to water under its provisions shall be determined by the date of the appropriation as respectively made by the parties, and that the water of the streams shall be made available to their full extent for irrigating purposes, without regard to deterioration in quality or diminution in quantity, "so that the same do not materially affect or impair the rights of the prior appropriator; but in no case shall the same be diverted or turned from the ditches or canals of such appropriator so as to render the same unavailable."

Several decisions of the Supreme Court of Montana have been cited to us recognizing the right by prior appropriation to water for purposes of mining on the public lands of the United States, and there is no solid reason for upholding the right when the water is thus used, which does not apply with the same force when the water is sought on those lands for any other equally beneficial purpose. In *Thorpe v. Freed*,¹ the subject was very ably discussed by two of the justices of that court, who differed in opinion upon the question in that case, where both parties had acquired the title of the government. The disagreement would seem to have arisen in the application of the doctrine to a case where title had passed from the government, and not in its application to a case where neither party had acquired that title. In the course of his opinion Mr. Justice Knowles stated, that ever since the settlement of the Territory it had been the custom of those who had settled themselves upon the public domain, and de-

¹ 1 Mont. 651.

voted any part thereof to the purposes of agriculture, to dig ditches and turn out the water of some stream to irrigate the same; that this right had been generally recognized by the people of the Territory, and *had been universally conceded as a necessity of agricultural pursuits*. "So universal," added the justice, "has been this usage that I do not suppose there has been a parcel of land, to the extent of one acre, cultivated within the boundaries of this Territory, that has not been irrigated by water diverted from some running stream."

We are satisfied that the right claimed by the plaintiffs is one which, under the customs, laws, and decisions of the courts of the Territory, and the act of Congress, should be recognized and protected.

Decree affirmed.

OVERMAN SILVER MINING CO. v. CORCORAN.

(15 Nevada, 417. Supreme Court, 1880.)

Eminent domain. The act of the legislature of Nevada approved March 1, 1875, entitled "An act to encourage the mining, milling, smelting, or other reduction of ore in the State of Nevada," is constitutional.

Location. No valid location of a mining claim can be made, until a vein or deposit of gold, silver, or metalliferous ore or rock in place has been discovered.

Conflict in testimony—Finding. When there is a substantial conflict in the testimony, the findings of the lower court will be held to be sustained by the evidence.

Condemnation of land in aid of mining. Plaintiffs sought to condemn and appropriate the defendant's land, for the purpose of sinking a vertical shaft, with which to develop the Comstock lode. The testimony showed that no other lands could be selected, except at great expense, and at places inaccessible to a railroad, or to wagon roads, without which the business of plaintiff could not be successfully conducted. *Held*, that a necessity existed for the condemnation of defendant's land, in order to advance the mining interests of Storey county, and that it presented a proper case for the exercise of the law of eminent domain.

Appeal from the District Court of Storey County, First Judicial District.

The opinion states the case.

LEWIS & DEAL for appellants, who were defendants below.

STONE & HILES, B. C. WHITMAN and WILLIAM WOODBURN, for respondents.

By the Court, HAWLEY, J.

Respondent is a mining corporation engaged in the business of mining, milling, and the reduction of ores, in Storey county, and instituted this proceeding to have condemned and appropriated to its use certain lands belonging to appellants, under the provisions of the act entitled "An act to encourage the mining, milling, smelting or other reduction of ores in the State of Nevada" (approved March 1, 1875), so as to enable it "to develop its mine and successfully carry on its said business."

The lands in question have been for several years located and claimed as mining ground.

The court before which this proceeding was tried, in its finding of facts, says: "That at the time of the location made by said defendants and their predecessors in interest in the said tracts of land, no vein or ledge of gold, silver, or other metalliferous-bearing ores, earth, or rock in place, had been discovered within any one of the said tracts of land, nor within any mining claim or claims of which said tracts of land, or any one of them, is or are claimed by the defendants to be a part of the surface ground, nor has there been since such locations were made, any vein, or ledge of gold, silver, or other metalliferous-bearing ores, earth, or rock in place, discovered or developed within any one of said tracts of land, or within any mining claim or claims of which said tracts of land, or any one of them, are claimed by defendants to be a part of the surface ground. * * *

That a necessity exists for the appropriation to the use of the petitioners of the three tracts of land described in the petition herein, for the purposes alleged in its petition, and particularly for the working and developing of its mining claim and quartz ledge, situated upon the Comstock lode in said Gold Hill mining district, and that the said three tracts of land are a part of the public lands or domain of the government of the United States of America."

Appellants seek to set aside the order of the court condemning their lands upon the following grounds, which they claim "are supported both by legal principles and the decided cases," viz.:

1. "That the act authorizing the condemnation of property by mining companies for their own purposes is unconstitutional, because not taken for a public use."

2. "That the act in question does not authorize the condemnation of mining claims; that the words 'real estate,' as used in it, do not include mining property."

3. "If mining is a public use, the land in question was, at the time it was sought to be condemned, appropriated to such public use, and could not therefore be condemned by any other company, unless the statute expressly authorized the taking of the property so used."

1. This court, in; *Dayton G. & S. M. Co. v. Seawell*, 11 Nev. 394, after a very thorough examination of all the decided cases then published, held that the act in question was constitutional. The only additional authorities now cited by appellants, upon which we are asked to overrule the decision in *Dayton v. Seawell*, are *Consolidated Channel Co. v. Central Pacific R. R. Co.*, 51 Cal. 269; *Salt Company v. Brown*, 7 W. Va. 191; and *Petition of Deansville Cemetery Association*, 66 N.Y. 569. These cases shed no additional light upon the question discussed in *Dayton v. Seawell*.

The truth is, as stated by Mr. Justice Cooley, that courts often find that they are somewhat at sea when they undertake to define, in the light of judicial decisions, what constitutes a public use.

"The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use, and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare, which, on account of their peculiar character and the difficulty, perhaps impossibility, of making provision for them otherwise, it is alike proper, useful and needful for the government to provide": Cooley's Const. Lim. 532. See also Mills on Eminent Domain, from Secs. 10 to 20, and authorities there cited.

¹ *Post* EMINENT DOMAIN ;

This question was discussed at length in *Dayton v. Searwell*, and without again attempting to review the authorities, it is enough to say that we are satisfied that the reasoning of this court in that case is sufficient to justify the conclusion there reached that the act in question is constitutional.

2. If the findings of the court as to the non-existence of any vein or ledge of gold, silver, or other metalliferous-bearing ores, earth or rock, is sustained by the evidence, then the second and third points (as above stated) relied upon by appellants, need not be considered, for under the laws of Congress no valid location of a mining claim can be made until a vein or deposit of gold, silver, or metalliferous ore or rock in place has been discovered: *Gleeson v. Martin White M. Co.*, 13 Nev. 457.

Are the findings sustained by the evidence?

It is claimed by appellants that the evidence conclusively shows that "one or more ledges of gold and silver-bearing quartz rock in place were discovered prior to the location of the claims, and have been developed since," and that upon this point "there is no substantial conflict."

This view is sought to be sustained upon the ground that the testimony of the witnesses introduced upon the part of the appellants was given after a careful examination, and is direct, clear and positive, while the testimony of respondent's witnesses was given without anything more than a superficial examination, and is simply negative in its character.

The record, however, shows that all of respondent's witnesses had been engaged for several years in the business of mining in Storey county, and were familiar with the Comstock lode. They say that assays of gold and silver can often be found in the country rock; that quartz can be found in many places over the hills from Virginia City to Washoe valley; that there are small seams of quartz and some quartz boulders to be found within the surface boundaries of the land sought to be condemned; but that there is no quartz vein, or lode, or anything to indicate a vein formation. Perhaps the strongest objection urged against the insufficiency of respondent's testimony is as to the superficial examination of the shaft "A," in the sinking and timbering of which, ac-

according to the testimony of one of the witnesses for appellants, some sixteen thousand dollars were expended.

This shaft is fifty feet deep. A witness for appellants testifies that it contains quartz-bearing mineral, having walls on each side of the ledge; that this ledge was, near the surface, about the width of his hand, but after going down about twenty feet "it widened between four and seven feet." The witnesses for respondent did not go down into this shaft, as there were no means then provided for their going down. They examined the dump containing the earth and rock taken out of the shaft. They found porphyry, feldspar, mixture of lime and broken-up quartz boulders, but nothing, in their judgment, to indicate a quartz vein.

Every lawyer at all familiar with the trial of mining cases where the question of existence, or non-existence, of a lode or vein is raised, understands the difficulty that is often, we might say always, encountered in the attempt to ascertain the facts. Practical miners, experts, and men of science are often examined as witnesses, and they frequently differ as much in their statement of facts as in their conclusions of judgment. It is especially the province of a jury to determine the disputed question of fact thus raised. When suits of this character are tried, it is often the custom to allow the jurors to visit and examine the ground in dispute, the better to enable them to correctly decide all questions where there is any conflict of opinion.

This proceeding was tried before the court without a jury. The judge presiding has had many years of experience in the trial of mining cases where the question presented in this proceeding has doubtless been often raised.

The record shows that he was requested to visit the premises, but does not state whether he complied with the request or not. In either event it is safe to say that he had better opportunities than we have of judging the character of the respective witnesses and the weight that ought to be given to their testimony.

In our opinion there was a substantial conflict in the testimony, and this statement is sufficient to authorize us (under the previous and frequent rulings of this court) to say that the findings of the court are sustained by the evidence.

3. The only remaining ground to be considered is, whether or not any necessity exists for the condemnation of the land for respondent's use.

It was held in *Dayton G. & S. M. Co. v. Seawell*, that the object for which private property is to be taken must not only be of great public benefit and for the paramount interests of the community, but the necessity must exist for the exercise of the right of eminent domain.

It is shown by the testimony in this case that the object of respondents is to sink a vertical shaft upon the lands sought to be condemned, for the purpose of striking the Comstock lode in its eastward dip at a point about four thousand feet below the surface of the earth. The lands are situated about three quarters of a mile east of the present underground works of the respondent. The Comstock lode dips to the east at an angle varying from thirty to thirty-five degrees.

The formation to the west of the lode is syenite, which is so hard as to render the sinking of shafts or the running of tunnels or drifts therein very difficult and expensive.

The respondent in its present workings, at a depth of about one thousand six hundred feet, has reached this hard formation, and every foot in depth which it may sink vertically carries it farther away from the lode which it is endeavoring to work and develop. And this work, if continued, would have to be prosecuted in a syenitic formation which, according to all the testimony, would render successful excavation impossible.

This testimony, in our opinion, sustains the findings of the court that a necessity exists to appropriate this land for the use of respondent. The fact that respondent proposes to abandon its present workings, to erect new and expensive hoisting works, and sink a new shaft at an enormous expense, indicates very clearly that a necessity exists for procuring some land for the purpose mentioned, for, as is well said by respondent's counsel, "It is contrary to the common sense and experience of mankind to say that men will propose to perform such gigantic labor and incur such vast expense when no necessity exists therefor. Men never engage in such enterprises except upon the most mature deliberation, and by

being impelled by the necessities of their present situation."

It may, for the sake of the argument, be admitted, as claimed by appellants, that respondent could have gone six hundred feet further west or six hundred feet further east and procured other land upon which to erect the necessary hoisting works and sink a shaft. The record, however, shows that all the adjacent lands are located and claimed as mining locations; hence the same objection could have been urged wherever the location of a site was chosen, and if this fact should be considered of sufficient importance to prevent the condemnation of the lands in question, then it would follow that no lands could ever be procured by the respondent under the act of the legislature.

This case would then come within the category of cases which, as was said in *Dayton G. and S. M. Co. v. Seawell*, were liable to happen, that "individuals, by securing a title to the barren lands adjacent to the mines, mills or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass, if not entirely defeat, the business of mining in such localities," and confirms the opinion there advanced, that "the mineral wealth of this State ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining."

The law does not contemplate that an "absolute necessity" should exist for the identical lands sought to be condemned. The selection of any site for the purposes specified must necessarily, to some extent, be arbitrary.

The position contended for by appellants is not sustained by any sound reasoning, and is wholly unsupported by authority.

In the matter of the petition of the N. Y. and H. R. R. Co., the court, in discussing this question, said: "It is claimed that there are other lands in the vicinity, equally well adapted to the use of the applicant as those sought to be acquired by these proceedings, and which possibly might be acquired by purchase from the owners. But such objections to these proceedings are untenable. The loca-

tion of the buildings of the company is within the discretion of the managers, and courts can not supervise it. The legislature has committed to the discretion of the corporation the selection of lands for its uses, and if the necessity of lands for such purposes is shown, and the lands sought are suitable, the courts can not control the exercise of the discretion, or direct which of the several plats of ground shall be taken. If the taking of one plat of ground in preference to another could be shown to work great mischief, and result in great loss, which could be prevented by taking another, and the proceeding to take one parcel compulsorily, in preference to another equally well adapted to the uses of the company, is from some unworthy or malicious motive, and not in the interests of the public, the court might entertain the question, and in the exercise of a sound discretion withhold its consent to the appropriation. But in this case there are good reasons, resulting from the present occupation of, and the expensive improvements put upon these premises by the appellant, why they should be taken if suitable and proper for the purposes required, the owners not claiming that they will sustain any especial injury peculiar to themselves, which would not be sustained by the owners of adjacent lands, if taken": 46 N. Y. 553. To the same effect, see *Boston and Albany R. R. Co.*, 53 N. Y. 576.

It appears from the testimony that the lands in controversy were the most eligible and convenient; that no other lands could have been selected, except at great expense, and at places inaccessible to a railroad or to wagon roads, without which the business of respondent could not be successfully conducted.

Upon a review of all the facts, it appears to our satisfaction that the appropriation of these lands to respondent's use will be of great benefit and advantage to the mining industry of Storey county; that it is necessary to condemn such lands for the protection and advancement of said interests, and that the benefits arising therefrom are of paramount importance as compared with the individual loss or inconvenience to appellants.

This brings the case within the provisions of the statute

and shows that a necessity exists for the exercise of the law of eminent domain: *Dayton G. and S. M. Co. v. Seawell*, *supra*; *Stuyvesant v. The Mayor of New York*, 7 Cow. 606; *Gilmer v. Lime Point*, 18 Cal. 250.

The order and judgment appealed from are affirmed.

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A coal company worked three coal veins through a single shaft, in violation of the statute. A fire occurred in the main shaft above the second level where H. was at work, and in the attempt to escape he fell to the third level and lost his life. *Held*, that the company was liable to the widow of H., though the fire was accidental, and though there was no real danger, the alarm on the part of H. being natural in the absence of any escapement shaft. A party having given another reasonable cause for alarm, can not complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility for damages resulting from the alarm. *Wesley Co. v. Healer*, 68

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ADVERSE CLAIM. *Continued.*

3. *Jurisdiction of U. S. Courts.*—An action brought in support of an adverse claim, filed against the issuing of a patent to mineral land, is a case which involves the construction of acts of Congress, and is therefore removable into the federal court, under act of March 3, 1875. *Frank Co. v. Larimer Co.*, 150

4. *Better title must prevail—Possession.*—In a suit supporting an adverse claim the better title must prevail. Actual possession makes a *prima facie* case and shifts the burden; but actual possession is not essential if the right of possession be proved. *Golden Fleece Co. v. Cable Co.*, 120

5. *Possession—Pleading—Burden of proof as to mineral character of land.*—S. had been in possession of the land in dispute, claiming it as a mill-site, for ten years before this suit, and several years before C. located the same, but had failed to designate the boundaries by any monuments. The gulch had been returned to the U. S. Land Office as mineral land, and had been worked as such, both above and below the disputed premises, but there was no other testimony tending to show that the tract in controversy contained any minerals. C. applied for patent, and was adversely by S. *Held*, that S. had the right of possession to the lands in controversy, and was not called upon to prove that they were non-mineral. *Held*, that C. having failed to allege that he had complied with the mining rules of the district where the land was situate, was not entitled to a patent. *Shafer v. Constans*, 147

6. *Mill-site against placer.*—An adverse claim may be filed and maintained by the claimant of a mill-site against an application for patent on a mining claim. *Id.*, 147

ADVERSE POSSESSION.

1. *Notoriety of a mining possession.*—Such possession as will ripen into title must amount to notice of claim of ownership; and mining operations, or the working of a lime kiln are more likely to attract attention than the ordinary operations of a farm. *Moore v. Thompson*, 221

2. *What constitutes adverse possession.*—After severance of the surface and mineral titles, acts of ownership, such as constitute possession and confer title under the statute of limitations, must be acts done with reference to the mines, *as such*. *Caldwell v. Copeland*, 189

3. *Facts amounting to adverse possession.*—The quarrying of rock, burning lime, and cutting wood for a lime kiln, building sheds, etc., continued during seven years, amount to an adverse possession under the statute of limitations. *Moore v. Thompson*, 221

4. *Facts amounting to adverse possession.*—The leasing of quarries and timber by the owner of adjoining land, and taking stone and timber from time to time, or permitting others so to do, for pay, during the statutory period, accompanied by the payment of taxes, all done under color of title and claim of right. *Held*, to amount to a continued adverse possession. *Colvin v. McCune*, 223

5. *Taking temporary supplies of coal.*—A mere digging of coal in the winter, with an abandonment of the property during the rest of the season, would not be sufficient, and such an occupation will not invalidate the sale of land for taxes as unseated land. *Jackson v. Stoetzel*, 228

ADVERSE POSSESSION. *Continued.*

6. *Seating mineral lands.*—Wild lands are usually seated either by residing on the land, or by cultivation, in such a manner as to indicate a permanent occupation of it; but mineral lands which are unsuited to a residence, and incapable of cultivation, may be seated by the owner or one who has color of title, if he derives a profit from them, by using them in the only way in which they can be used. *Id.*

7. *Seating by trespasser—Tax sale.*—To enable a trespasser to seat a tract by enjoyment of profits, a permanent use of the land is necessary. *Id.*

8. *Claim distinguished from color of title.*—To constitute a bar under the statute of limitations, it is not necessary that the party hold under color of title; it is sufficient if he hold under a claim of right. *Colvin v. McCune*, 223

9. *Tax deed.*—A tax deed, though void on its face, may amount to color of title. *Id.*

10. *Mining during the mining season.*—In an action brought by one claiming under a tax deed recorded in 1858, to bar the title of the original owner, defendant offered to show that from 1858 to the commencement of the action during the mining season of each year, from two to ten miners had constantly worked and mined for lead ore upon said land, they being usually farmers, working their farms during the summer and mining during the winter, and working the land under verbal leases from defendants or their agent to whom they paid rent; also, that a custom exists where this land is situate, making it obligatory upon the land owner to hold mineral diggings for the miner operating them during the summer season, though the miner does not work during such summer season; also, that said mining "was mostly near the surface and in open cuts, so as to be plainly visible to all," etc. *Held*, that it was error to reject this evidence, as the facts stated would have shown the action to be barred by the statute. *Wilson v. Henry*, 152

11. *Statute of limitations—Strict construction.*—Evidence of adverse possession is always to be strictly construed, and every presumption is to be made in favor of the true owner. The party whose title is to be destroyed or remedy barred, may properly stand on the letter of the statute, and insist upon a strict compliance with its conditions. *Id.*

12. *Adverse possession as notice.*—Actual adverse possession is notice to one who purchases from one whose sole title is possession. If A sell to B, and B enter upon and remain in possession, a subsequent sale by A to C would be affected with notice resulting from such possession; but if B quit possession, and while out of possession, and his deed not recorded, A sell to C, the latter vendee is an innocent purchaser. *Partridge v. McKinney*, 185

13. *Idem.*—Where possession is notice and the possession ceases, the notice ceases with it. *Id.*

14. *Squatter on patented mill-site.*—In 1869 a mining company obtained a patent from the United States for a mill-site. In 1872 P. purchased of C. certain buildings standing on the patented ground and built a fence around the premises and occupied and improved the same, with the knowl-

ADVERSE POSSESSION. *Continued.*

edge of the agent of the company, but without any objection on his part until 1876, when he asserted title and demanded rent. P. testified that she never knew until this time that her title to the premises was disputed, but had always claimed to be the owner thereof. The mining company did not know that P. made any such claim until 1876. *Held*, that P.'s possession was adverse to that of the company, and having been so for more than three years, the statutory period, her title had become perfect. *National Co. v. Powers*, 234

15. *Evidence*.—On the trial the company offered to prove that when C. sold the buildings to P. he told her that he claimed no interest in the ground, that the company owned the land, and that the buildings were erected by its permission. *Held*, that this evidence was properly excluded, because P. did not claim title to the ground through C., but claimed it by adverse possession. *Id.*

16. *Case of trust distinguished from co-tenancy*.—In cases of express trust or of direct confidence, the evidence to show a denial of the relation between the parties must be of stronger character than if the case be that of co-tenancy alone, but in all cases there must be proof of such positive acts or continued conduct, as tend to bring home notice to the party to be affected. *Susquehanna R. R. Co. v. Quick*, 202

17. *Ouster by co-tenant retaining profits exclusively*.—A mere reception of rents and profits by one tenant in common will not prove an ouster, but open and notorious possession and retaining the profits exclusively for twenty-one years, is sufficient to justify a finding both of ouster and adverse possession. *Id.*

18. *Prescription—Ditch property*.—Five years continuous possession of a ditch, open, notorious and exclusive, and known to the adverse party, gives title by prescription. *Campbell v. West & Mathis*, 213

19. *Surface possession after severance*.—The rule that possession of the surface is possession indefinitely downward, does not apply after there has been a grant or reservation of the minerals separate from the surface ownership. *Caldwell v. Copeland*, 189

20. *Surface possession*.—In ejectment for mines the plaintiff proved himself lord of the manor, and that he was in possession thereof. But the same witness proving that the defendants had had possession of the mines above twenty years, the court, upon a trial at bar, held this no evidence to avoid the statute of limitations, there being no entry within twenty years upon the mines, which are a distinct possession, and may be different inheritances, and therefore directed the jury to find for the defendants. *Rich v. Johnson*, 173

21. *Surface possession after severance*.—In the tenth year of James I, the coal under the fee farm lands of Ripley was granted to a party from whom defendant traced title. Plaintiff owned a fee farm in Ripley, and sued defendant for taking coal. Neither plaintiff nor defendant had ever taken coal from this certain fee farm, until the present alleged trespass, but defendant had worked under other farms in Ripley. *Held*, that the possession of the surface by the plaintiff was not inconsistent with defendant's claim to the coal, and that verdict for defendant was justified. *Hodgkinson v. Fletcher*, 173

ADVERSE POSSESSION. *Continued.*

22. *After severance, surface user is not adverse.*—Where the right to dig ore is granted, but not exercised during forty years, such neglect, in the absence of adverse enjoyment, will not extinguish the right; and the occupation and cultivation of the soil above, during such period, is no evidence of adverse enjoyment as to the minerals. *Arnold v. Stevens*, 176

See APPROPRIATION, 15; PRESCRIPTION, 1; STATUTE OF LIMITATIONS.

AGENT.

1. *Evidence of authority.*—The acts and declarations of the officers of a mining company are admissible to show authority of the agent to make expenditures in litigation and in compromising claims; and no resolution or formal corporate action allowing such expenditures need be shown *Wild v. New York Co.*, 413

2. *General agency inferred.*—A general agency may be inferred from facts and circumstances; from the habit and course of dealing. *Lyell v. Sanbourn*, 313

3. *Proof of agency.*—An agency for the care of property may be both created and proved by parol. *Hardenbergh v. Bacon*, 352

4. *Evidence.*—H. having alleged that B. was her agent with reference to certain mining property, was properly allowed to show the nature of her claim, though the evidence did not show title in her. *Id.*

5. *Subject-matter of agency.*—A claim of title may be the subject-matter of an agency, as well as property to which the title is perfect. *Id.*

6. *One person acting as agent for two companies.*—When the same person is made agent of two mines in the same vicinity, and it becomes necessary for one to deal with the other, he must be presumed to have the same power to act for both that would be possessed if there were two agents acting separately, and may dispose of property in the same way. And such a double authority would dispense with such formalities as could not be complied with where one man acts for both companies. *Adams Co. v. Senter*, 241

7. *Transfer of property from one company to another, when the same person is agent for both.*—Where one of such companies authorizes its supplies to be used for the benefit of the other, a third person may rely on the authority of such joint agent in transferring any property belonging to either, as sufficient to pass title, and no formal transfer from one company to the other would be necessary to protect a purchaser dealing with either. The agent will be treated as competent to bind both. *Id.*

8. *Authority of such agent.*—Where an agent is empowered to use the supplies of one company for another, he may use them as well in exchange for articles necessary to be purchased, as *in specie*. And where timber owned by one company, was used to obtain powder for the other, which could only be done by settling also an outstanding powder account, it was held within his discretion. *Id.*

9. *General powers of superintendent.*—The authority of mining superintendents, or general agents in charge of mines, will be recognized with-

AGENT. *Continued.*

out proof, as covering all the ordinary local business of the concern; and persons dealing with them have a right, in the absence of notice to the contrary to assume they have such power. *Id.*

10. *Agent's power to hire.*—An agent of a mining company may employ laborers in the business of the company, but he can not pledge the faith of the company to persons not so employed. *Cons. Gregory Co. v. Raber,* 405

11. *Power of mining company to buy timber—General agent.*—There is no lack of power in a mining company to buy timber, and a purchase of it by a general agent is within his powers; and a sale of it, made by him, will be upheld. *Adams Co. v. Senter,* 241

12. *Agent can not pledge credit, even to save sacrifice.*—The resident agent of a mining company has no *implied* authority to borrow money upon the credit of the shareholders, to pay arrears of wages to miners; although they may have obtained warrants of distress upon the materials belonging to the mine, nor in any other case of emergency or necessity. *Hawtayne v. Bourne,* 285

13. *Authority of mining superintendent to borrow money.*—A mining superintendent, by virtue of his employment merely, has no authority to borrow money on the credit of his principal. The power of an agent to draw on a principal's funds is entirely different from the more comprehensive power to draw on his *credit*. The former does not include the latter. Neither by note nor overdraft, can a mining superintendent, as such, bind his principal. *Breed v. First Nat. Bank,* 467

14. *Superintendent can not borrow money—Special power, construed.*—By the deed of association of a mining company it was provided that its affairs should be conducted by a committee or board of managing directors, who were allowed to vote by proxy. B. was the resident director, or local superintendent, reporting monthly to the committee, and was prohibited from expending or engaging the credit of the company beyond a certain monthly sum. *Held.* (1) that the board was not bound by drafts accepted by him for such board of directors, even for the necessary expenses of the mine, unless accepted by express authority. (2) That a managing director, present only by proxy, was not bound by a vote of his proxy, authorizing the borrowing of money or the payment of drafts for money already borrowed. *Brown v. Byers,* 308

15. *Power of attorney.—Promissory note.*—General words in powers of attorney. are limited and controlled by particular terms and designations. Authority granted by B to A, "to do all acts in his name, concerning their mining operations," followed by the authority to sign B's name to any "company articles," does not authorize A to sign B's name to a promissory note, even where the money was used for the purpose of carrying on their joint mining operations. *Washburn v. Alden,* 320

16. *Implied agency of corporate officers.* *Moss v. Rossie Co.,* 289

17. *Corporate officers are agents*—A director of a corporation is an agent or trustee, and subject to the obligations and disabilities resulting from that relation. *Cumberland Co. v. Sherman,* 322

18. *Corporation formed by agent.*—A new company, organized by such agent, in which company he is a director and principal stockholder,

AGENT. *Continued.*

will take the land, charged with full notice of the facts attending the purchase, and will stand in no better position than the agent who was its grantor. *Id.*

19. *Appointment of agent by corporation—Evidence.*—In the appointment of their agents, private corporations stand upon the same footing as natural persons, unless limited to some particular mode by their charters; and parol evidence is admissible to prove such agency. *Carey v. Philadelphia Co.*, 349

20. *Hostler for agent.*—The hire of an hostler in charge of a team used by the agent in the business of the defendant company, and also while attending to business for other companies, is not a contract within the power of the agent to bind the company. *Cons. Gregory Co. v. Raber*, 405

21. *Ratification.*—But the admission of the corporate officers, when informed of the claim, were held to amount to a ratification. *Id.*

22. *Option of principal to ratify.*—The principal may, at its election, adopt a sale so made to its agent, or may have it set aside, without proof of actual fraud. *Cumberland Co. v. Sherman*, 322

23. *Duty of principal to either ratify or repudiate.*—Where an agent, without original authority, borrows money on behalf of his principal, and uses it in a manner advantageous to the principal, the ratification of the agent's act may be inferred from the silence of the principal after knowledge of the facts. It is the duty of the principal to repudiate the unauthorized act, if he does not acquiesce in it, and, if he fail to do so within a reasonable time, the jury may infer a ratification; but no estoppel is created if the unauthorized action is complete before knowledge of it reaches the alleged principal, and the *status* of the parties would not be changed by his failure to approve or disapprove within a reasonable time. *Breed v. First Nat. Bank*, 467

24. *Ratification of unauthorized acts.*—It was entirely correct to charge the jury, that if Sabin was the agent of the company in working its mines, without authority to borrow money, but did in fact borrow large sums in its name of the plaintiff, and if on December 16, 1868, the president was informed of such borrowing and of the amounts, and a demand was made for the payment thereof, and if within a reasonable time the company failed to disavow the acts of its agent in so borrowing the money, the jury would be authorized to consider the company as assenting to what was done in its name. *Union Co. v. R. M. Bank*, 433

25. *Agent as trustee.*—An agent who buys the outstanding title to his principal's mining claim, may be treated by his principal as trustee in effecting the purchase and taking the title; he can not act on the subject-matter of his trust for his own benefit. *Hardenbergh v. Bacon*, 352

26. *Agent can not assume adverse relation.*—While the relationship exists, an agent can not make himself a party adverse or opposed in interest to his principal. If employed to sell, he can not buy, and *vice versa*. *Deep River Co. v. Fox*, 296

27. *Distinction between ministerial and other agents.*—But this rule applies only to such agents whose employment is a trust rather than a service, and not to those employed merely as instruments of performance. *Id.*

AGENT. *Continued.*

28. *The rule not applied to agent forcing legal sale for just debt.*—A mining agent to whom the employing company was in arrears for a debt admitted to be just, after notifying the company of his intention so to do, sued and had judgment for his claim; after judgment he notified them of his intention to levy and sell the property, to which notice no attention was paid, and the mines of the company were accordingly sold and bought in by him. In his previous dealings with the company, also, he had been allowed to take a lot of ore as payment on account, out of which he was alleged to have made an unreasonable profit, having concealed, it was alleged, its real value. *Held*, that as to the suit and sale, his conduct was mere self-protection, and that the charge of fraud on the ore purchase was not sustained by the facts. *Id.*

29. *Agent can not contract for profit.*—As between trustee and *cestui que trust*, or agent and principal, the rule is inflexible that the trustee or agent can not take the benefit of a transaction which was in violation of his duty or when the benefit and duty are inconsistent. *Cumberland Co. v. Parish*, 423

30. *The rule includes corporate officers.*—Directors and managers of corporations are within the rule guarding transactions between trustees and beneficiaries, or principals and agents. *Id.*

31. *Profit at expense of company.*—In case of corporate directors there is an inherent rule that they must not use their positions to advance their own interest as distinguished from that of the corporation. *Id.*

32. *Burden of proof.*—Where a fiduciary relation existed the burden is upon the trustee to show the transaction with his beneficiary, to have been done in perfect fairness—and this by proof, independent of the instrument under which he claims. *Id.*

33. *Can not act for both parties without their consent.*—If an agent act for both parties in the same transaction, he can not recover compensation from either, unless the parties knew and assented to his acting for both. Nor can an agent become the purchaser without the knowledge and assent of the seller; nor if he be employed to purchase, can he be himself the seller. *Finerty v. Fritz*, 437

34. *Rights of agent and agent's partner.*—B. was the agent of H. with reference to certain mining ground to which H. claimed title. B was also in partnership with W., and B. & W. purchased the outstanding title to the property. *Held*, that B. & W. took as tenants in common; that B. took an undivided half as trustee for H., his principal, and that W. took the other undivided half in his own right; that W. had the same right to purchase the outstanding title as any other person, and that his partnership imposed no disability upon him in respect to the property. *Hardenbergh v. Bacon*, 352

35. *Agent can not make secret profit.*—In the purchase of the land as such agent, defendant could not lawfully obtain any advantage or make any profit for himself inconsistent with the interests of his principals. And if, by any secret arrangement with the vendors of the land under pretense of commissions or otherwise, he obtained it for a less sum than was expected by the subscribers or represented by himself, he must account for the difference. *Collins v. Case*, 91

AGENT. *Continued.*

36. *Agent must account for his own subscription.*—Defendant himself being a subscriber, and retaining his interest in the property of the company, as if his subscription were actually paid, he must account for the amount of it, as well as for that of other subscriptions actually paid. *Id.*

37. *Agent can not purchase.*—A director of a corporation, employed as its agent to examine and report on lands of the company, and advise as to their sale, can not, after examination resulting in the recommendation of a sale, become the purchaser himself, and take a conveyance for his own benefit; and if such purchase is afterward ratified by the stockholders, he must show affirmatively the fairness of the transaction. *Cumberland Co. v. Sherman,* 322

38. *Steward taking lease.*—The steward of an estate taking a mining lease from his principal, his character as agent accompanying him as tenant, deprives him of the benefit of an objection that might be competent to another person, as to delay or neglect of the plaintiff in making a demand upon the defendant for the excess of coal taken out under his lease. *Beaumont v. Boulton,* 253

39. *Account—Involving fraud.*—In this case a general account was decreed against the tenant, who was also agent, with respect to fraud, concealment and breach of trust. *Id.*

40. *Clandestine partnership.*—An agent can not have a clandestine partnership with a party supplying timber to the mine of his principal, and will be decreed to account for and pay over the profits of such proceedings. *Massey v. Davies,* 247

41. *Acceptance of service of summons.*—An attorney in fact for a mining corporation, who is not its general manager, and who has not express authority to appear in suits against it, can not bind the company by accepting service of summons for it. *Lamb v. Gaston Co.,* 381

42. *Contract to pay price in excess of authority—Laches.*—On November 11, 1864, an agent of the Atlas Mining Company made an arrangement with Johnston, the plaintiff, to substitute said company as purchaser of certain mining lands at a guardian's sale, in place of another party, the highest bidder, at a price known to plaintiff to be in excess of the authority of such agent. On November 12th, the agent wrote to the officers of the company informing them of the arrangement, and a delay having occurred until January 9th following, owing to a misunderstanding between plaintiff and said agent as to whether or not the deeds and abstracts of title were to be sent to the office of the company in Boston, to be examined before ratification, such papers were on that day so sent, and the officers of the company, by letter from Boston, dated February 13, 1865, declined to ratify the purchase, of which refusal plaintiff was informed by said agent by letter dated March 6, 1865. *Held,* in an action of assumpsit for purchase money, that in the absence of any other evidence of ratification or estoppel the company were not liable. *Atlas Co. v. Johnston,* 388

43. *Recoupment—Measure of damages for wrongful discharge.*—In an action by a coal company against its former agent, for money had and received, the agent, who was wrongfully discharged before his time, is entitled to recoup compensatory damages. But in mitigation of damages,

AGENT. *Continued.*

where other employment has been obtained, the extent of compensation received in such other employment may be shown; but if this other employment is a business requiring harder labor and more capital, the damages should not be reduced to the full amount of his earnings, but the amount to be deducted should be left, as a question of fact, for the jury. *Williams v. Chicago Co.*, 397

44. *Contract construed—Statute of frauds—Coin contract—Measure of damage.*—T. proposed in writing to the P. G. M. Co. to engage as superintendent of their mines in California for three years, at a stated salary and "expense of passage to the mines." The directors voted to choose him at the salary named, and "to pay his expenses out to California"; they also voted certain rules as to his duties, and required a bond with sureties for faithful performance of his duties. T. gave the bond, received a copy of the rules, went to California and entered upon the duties of his office, from which he was unjustifiably discharged within a year.

Held, that the company were to pay T.'s expenses to the place in California to which they employed him to go. That their vote, signed by their clerk, constituted a contract in writing within the statute of frauds. That the statement in the contract that the salary is payable in specie does not alter the amount due. That he can recover the amount of currency expended in buying gold to pay his expenses. That the measure of damages for breach of contract should be estimated in currency and approximate as nearly as possible to a just compensation for the actual injury sustained, and that it would be a pertinent inquiry where he might be obliged to go to find suitable employment. *Tufts v. Plymouth Co.*, 371

45. *Changing terms of written contract.*—A parol contract made by the authorized agent of a corporation, is an express promise of the corporation; but the promise of the agent, made without authority, changing, in effect, the terms of a written contract of the company, is void. *Lonkey v. Succor Co.*, 411

46. *Substitution.*—When an agent can not purchase directly from his principal he can not act for another in making such purchase. *The Cumberland Coal and Iron Co. v. Sherman*, 322

47. *Personal liability of stockholder—Agent not a servant.*—The agent of a mining company whether acting as its commercial and financial agent, or with extended powers as the manager of its affairs in Mexico and California, the same as the company could do if located there, is not a servant of the corporation within the meaning of the general Manufacturing Act, § 18, Chap. 40, Laws of 1848 of New York, making the stockholders of corporations organized under it, liable for services performed by laborers and servants, etc., for the corporation; and he can not recover from a stockholder for services rendered to the corporation while thus employed. *Hill v. Spencer*, 414

48. *When entitled to commission, though sale not made.*—The general rule is, that the duties of an agent continue, and commissions are not due until he has effected a bargain and sale by a contract which is mutually binding on the vendor and the vendee. But when the agent produces a purchaser acceptable to the owner, and able and willing to purchase, on

AGENT. *Continued.*

terms satisfactory to the owner, the agent has performed his duty; and if through the fault of the owner the sale is not consummated, the agent may recover his commissions. *Finerty v. Fritz*, 437

49. *Commissions.*—When an agent to sell negotiates such conditional sale, as between himself and his principal, the execution and delivery of such title bond to the purchaser or obligee, may be regarded as a sale of the property during the option; and the agent may negotiate a further sale of the same property for the obligee without forfeiting his commissions. *Id.*

50. *Agent to sell, himself becoming purchaser, not entitled to commission.*—But if the agent, concealing from the obligee his agency to sell, induce the latter to undertake in connection with himself the purchase of the property, such concealment being obnoxious to the rules of public policy, will avoid his commissions, whether the seller knew of the double relation or not. *Id.*

51. *Action for trifling or pretended services.*—A mining agent, suing his company for services in *keeping off trespassers, etc.*, during the period of his pretended service, had written, that while he was really *not* agent, the belief that he was such, had prevented the claims being relocated; and during this time he had covered up some shafts, and paid “some attention” to the property: *Held*, no cause of action proved. *La Crosse Co. v. Scudder*, 447

52. *Sale under power of attorney not under seal—Principal and agent.*—An instrument not under seal executed by an attorney in fact, authorized so to do by power of attorney not under seal, conveys an equitable estate in the premises which, united to the fact that the vendee takes and retains possession for several years, will enable him to maintain an action for an interruption to his possession or for injury to the property. The rule requiring an instrument to be executed in the name of the principal does not apply to those not under seal and though signed by the agent alone, the principal only will be bound if such appears to be the intention expressed in the instrument. *McDonald v. Bear R. Co.*, 616

See ACCOUNT, 12; BILLS AND NOTES, 2-5; CONVEYANCE, 1; FRAUD, 1; PLEADING AND PRACTICE, 1, 2.

AGRICULTURAL LAND.

1. *Criterion between agricultural and mineral lands.*—The boundary between mineral and non-mineral lands can not be defined with certainty, but perhaps the true criterion would be to consider whether upon the whole the lands appear to be better adapted to mining or other purposes. It is the duty of the officers of the government to determine whether the lands are mineral or not, before making a grant. *Ah Yew v. Choute*, 492

2. *Patent.*—The patent is the record of the State that the land was subject to location, and has been located pursuant to the terms prescribed by law, and in this case it is also a record of the judgment of the State that the characteristics of the land were not such as to constitute mineral lands; and the verity of this record is not overthrown by the fact that the

AGRICULTURAL LAND. *Continued.*

land contains sufficient gold to induce the plaintiff to mine it for that metal. *Id.*

ALIENS.

1. *Aliens can not locate.*—An alien who has never declared his intention to become a citizen of the United States, can not locate a mining claim, nor can he hold by actual possession against one who connects himself with the government by compliance with the mining law. *Golden Fleece Co. v. Cable Co.*, 120

2. *Alien and citizen, joint location.*—The fact of one of several locators being an alien does not invalidate the location as to his co-locators. *Id.*

3. *Relocation.*—When the first locator is an alien, or if a location be left incomplete, or abandoned, the ground becomes open to relocation “as complete y as if no stake had ever been planted upon it.” *Id.*

4. *Mining rights confined to citizens.*—The license to explore, occupy and purchase any of the lands of the United States containing minerals, is confined to citizens of the United States, and to those who have declared their intention to become such, under § 2319, Rev. Stat., U. S. ; though when there was no legislation upon the subject, the assumption that the occupant was in possession with the consent of the United States, applied as well to aliens as to citizens. *Chapman v. Toy Long*, 497

5. *Treaty with China.*—Provisions in mining regulations, as well as in the State constitution, which forbid Chinamen from working in a mining claim, are in direct conflict with Art. 6 of the treaty with China, of July 28, 1868, and therefore void. Under that treaty Chinamen have the right to follow any lawful calling which is open to the subjects or the most favored foreign powers. *Id.*

6. *Foreign miners' license.*—The acts of 1860 and 1861, relating to foreign miners' licenses, are substantially the same, and do not refer to mines contained in lands, which are the private property of individuals, but only to mines in the public lands of the State or United States. *Ah Yew v. Choate*, 492

7. *Tax.*—The mere fact that a Chinaman resides in a mining district, does not subject him to the foreign miners' tax. *Ah Pong, ex p.* 507

8. *Foreigner's license.*—Foreigners, who are *bona fide* residents, are entitled to the same rights of property, under the constitution of California, as native born citizens; and the law which prohibits them from taking gold from the mines of that State, without first obtaining a license, can only be enforced by the State, and not by interested volunteers. *Mitchell v. Hagood*, 506

ANNUAL LABOR.

1. *Extent of the annual period.*—Under the act of Congress of May 10, 1872, the owner of a lode who has performed his annual labor for one year, has the whole of the following year in which to perform his annual labor for that year. *Belk v. Meagher*, 522

2. *Claims located prior to 1872.*—On mining claims located prior to 1872, the owner was required to do at least ten dollars worth of work on each one hundred feet before January 1, 1875, or on that date the prop-

ANNUAL LABOR. *Continued.*

erty became subject to relocation by a stranger, unless the owner was then in the actual possession of the claim, and had resumed work thereon.

Little Gunnell Co. v. Kimber, 536

3. *Work by third parties—Resuming work before relocation.*—Work done by third parties, and purchased by the claimant after suit brought to recover possession, can not inure to the benefit of such claimant, but a failure to work the claim is not an absolute forfeiture; the original locator may resume work at any time before another has taken possession with intent to relocate; it is the entry of the new claimant, not the mere lapse of time, which determines the right of the original locator. *Id.*

4. *Amendment to § 2324, Rev. Stat. construed.*—The act of Congress of Jan. 22, 1880, amending § 2324, Rev. Stat., did not act retrospectively, and its first application to claims located since May 10, 1872, would be Jan. 1, 1881. *Slavonian Co. v. Perasich,* 541

5. *Threats to prevent resumption of work.*—Threats made at a distance from a mine, to prevent the owner from doing the annual labor, will not excuse a failure on his part to resume work; there must be an effort to do the work, or the claim will become open to relocation. *Id.*

6. *Resuming work—Act of May 10, 1872.*—The original locator of a mining claim has the exclusive possessory right until the time for annual labor has passed, and if before another enters on his possession and relocates the claim, he resumes and performs work to the extent required by law, his rights are precisely what they would have been, if no default had occurred; and under the act of May 10, 1872, the work may be done at any time within the entire year from Jan. 1st to Dec. 31st. *Belk v. Meagher,* 510

See ABANDONMENT; RELOCATION.

APEX.

1. *Top or apex defined.*—The top or apex is the end or edge or terminal point of the lode nearest the surface of the earth. It is not required that it shall be on or near or within any given distance of the surface. If found at any depth, and the locator can define on the surface the area which will inclose it, the lode may be held by such location. *Iron Silver Co. v. Murphy,* 548

2. *Top or apex defined.*—The act containing these words was framed upon the hypothesis that all lodes and veins stand upon their edge in the body of the mountain, and the words top and apex refer to the part which comes nearest to the surface. *Stevens v. Williams,* 557

3. *Location other than at top.*—No location can be made on the middle part of a lode, or otherwise than at the top and apex, which will enable the locator to go beyond his line. *Iron Silver Co. v. Murphy,* 548

4. *Location void beyond where apex leaves side lines—Description in verdict.*—A lode location is valid only to the extent to which the top or apex is included within the claim; and where it is not included the entire length of the claim, the jury (in finding for the plaintiff on such a location) should designate in their verdict, the extent of the lode to which the plaintiff is entitled. *Id.*

APEX. *Continued.*

5. *Contact veins—Rock in place—Dip.*—The joinder or union of rocks differing in character, as porphyry and limestone, is not a mineral vein or lode, unless the intervening space contains ore of appreciable value; and the fact that ore is sometimes found between such rocks does not change the case. If the ore does exist between the two varieties of rock, then, in order to constitute a lode or vein, the rock must be in place, *i.e.*, in its original position in the structure of the formation. If the plaintiffs have the apex of a lode as thus defined upon their ground, and it descends thence into defendants' ground, the plaintiffs have the better title. *Stevens v. Gill*, 576

6. *Swell in the vein.*—The top or apex of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein. If a vein, at its highest point, turns over and pursues its course downward, then such point is merely a swell in the mineral matter, and not a true apex. *Stevens v. Williams*, 566

APPROPRIATION.

1. *Common law water rights changed.*—At an early day the doctrine of the common law relative to riparian owners was found to be inadequate to the protection of miners in the Pacific States and Territories, as respects the use of water for mining purposes, and the first appropriator is regarded, except as against the government, as the source of title; but the right to water by prior appropriation on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. *Atchison v. Peterson*, 583

2. *Title by occupation and its incidents.*—The public mineral land is open to appropriation; the act of occupancy signifies the appropriation; once appropriated, it may be transferred by any authorized mode, in which case the continuity of possession is preserved, or the appropriator may abandon it. *Richardson v. McNulty*, 11

3. *Miners' rights not paramount.*—The rights of miners and persons owning ditches constructed for mining purposes are not paramount to all other interests regardless of the time or mode of their acquisition, but the miner or ditch owner must exercise his rights subject to prior vested rights in others. *Wixon v. Bear River Co.*, 656

4. *Right of possession and appropriation.*—The right of a locator of a mining claim to the possession of his claim, and to appropriate the mineral therein, is full and complete so long as the existing mining law remains in force. *Chapman v. Toy Long*, 497

5. *Priority in appropriation—Notice.*—Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent on the ownership of the land through which the water flows. The notice of intention to appropriate water must be sufficient to put a prudent man upon inquiry. *Kimball v. Gearhardt*, 615

6. *Water rights—Test of priority.*—Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows. *Kelly v. Natoma W. Co.* 592

APPROPRIATION. *Continued.*

7. *Relation—Constructive possession.*—The appropriation of water can not be constructive. It can not rest in intention. Yet, if prosecuted in good faith, it relates back to the commencement of the improvements by which appropriation was made. *Id.*

8. *The doctrine of relation applied.*—When the work of constructing a ditch is pursued with reasonable diligence, the date of appropriation relates back to the commencement of the ditch. *Woolman v. Garringer*, 675

9. *Notice.*—Notice of appropriation posted along the stream, combined with the continued prosecution of the work, was sufficient to charge plaintiffs with notice of defendants' claim. *Id.*

10. *Title to water.*—V. acquired certain water rights for milling purposes in 1850. The defendants appropriated water from the same stream, forty miles above, for ditch purposes in 1851. In 1854 plaintiffs succeeded to the rights of V. *Held*, that if V. did not abandon his claim, the appropriation by defendants was limited to water not appropriated by V., and that plaintiffs might possibly maintain an action for diversion without connecting their title with V. *McDonald v. Bear R. Co.*, 626

11. *Notice alone not a sufficient appropriation.*—A mere notice of intention to appropriate a portion of the public domain for mining purposes, has generally been held a sufficient appropriation until the proper season arrives for working the claim, but a party can not, by mere notice, take up and hold a claim for five years without any intention of working it unless water is brought to the district by artificial means. *Gottschall v. Mel-sing*, 667

12. *Water rights.*—The appropriator of public lands belonging to the government is entitled to the use of streams and water-courses naturally flowing through such lands, as against persons subsequently appropriating and using the water of such streams. *Crandall v. Woods*, 604

13. *Intervening appropriation of water.*—If one who has appropriated a part of the water of a stream to propel machinery at a point on the same, makes a conveyance of all his interest in the water of the stream to one who has a ditch above, he does not thereby lose his prior right to the water which flows down after the sale, as against one who appropriated the water of the stream below him after his appropriation, but before his sale. *McDonald v. Askeu*, 660

14. *Right of appropriation of water.*—The right to the use of a water-course on the public mineral lands, and the right to divert and use the water therefrom, is acquired by the first appropriator. *Yankee Jim's Co. v. Crary*, 196

15. *Lost by adverse possession—Grant presumed.*—Such right of the appropriator may be lost by the adverse possession of another. And after an adverse enjoyment for the period fixed by the statute of limitations, a grant will be presumed. *Id.*

16. *Running waters.*—He who first subjects running water upon the public domain to his use is regarded as the source of title in all controversies respecting it; and this is equally true whether the water be used for mining or other useful pursuits. *Basey v. Gallagher*, 633

APPROPRIATION. *Continued.*

17. *Conflict of laws.*—The right by priority does not depend upon uniformity in the local laws, State legislation and decisions of courts, but in case of conflict between local custom and statutory regulation, the latter, as of superior authority, must necessarily control. *Id.*

18. *Change of the place where water is used.*—The prior appropriator of water has the right to change the place of use and divert the water to any other point, to the extent of his appropriation. Appropriation, use and non-use are the tests of his right; and place of use and character of use are not. *Woolman v. Garringer*, 675

19. *Water rights—Diversion—Limited appropriation.*—The appropriation of the water of a stream, in order to apply it to some useful purpose, secures a right which can not be infringed upon by a subsequent appropriation of the water by others, but diverting the water from its natural channel for the purpose of drainage simply, is not an appropriation of the water; and one who has appropriated water for a special purpose can not afterward appropriate the surplus to the detriment of others, who in the *interim* have appropriated that surplus. *McKinney v. Smith*, 650

20. *Waste water.*—The right acquired by the appropriation of waste water from defendants' ditch is subordinate to that of the first appropriator, and liable to be determined at any time by his action, unless the water had been returned into its original channel, without any intention of recapture. *Woolman v. Garringer*, 676

See CLAIM, 1; DAM, 1.

ASSESSMENT—see ACCOUNT, 14.

ASSIGNMENT.

1. *Sale of chose in action.*—The owner of slag can not sell and transfer a good title to it, when in the adverse possession of another who claims it as his own; he has but a right of action against the person in possession, which is not the subject of legal transfer. *McGoon v. Ankeny*, 9

See BILLS AND NOTES, 1.

BILLS AND NOTES.

1. *Mining company's note—Assignment.*—The notes of a mining company made by its agent, without authority, are void as against the company, and their assignment will not operate as an assignment of the indebtedness for which they are given. *Carpenter v. Biggs*, 407

2. *Mining company's due bills.*—The superintendent of a mining company being sued upon due bills, signed "J. A. Bidwell, Supt. C. S. M. Co.," may prove that the consideration for the bills passed to the company; that the credit was given to it; that he had authority to bind it, and that he acted solely as such superintendent, to the knowledge of the payees and their assignee. *Schaefer v. Bidwell*, 409

3. *Authority to draw bill of exchange.*—A. received the following telegram:

"ST. LOUIS, Feb. 23, 1874.

"To JOSEPH ALGER, Philipsburg:

"Care for company's property. See that McArdle has what he needs. If funds needed, draw on company.

"CHAS. C. WHITTLESEY."

BILLS AND NOTES. *Continued.*

And thereupon drew upon Whittlesey, as Prest. Hope Mining Co., for \$1,000, and signed the draft "Hope Mining Co., by Jos. M. Alger," which draft B discounted and presented to the Hope Mining Co. for payment, which was refused on the ground that A. had no authority to draw. A. had previously drawn a similar draft for \$500, which B had discounted and the H. M. Co. had accepted and paid, and A. had also checked against the funds of H. M. Co. in Deer Lodge and Helena: *Held*, that the burden was upon B, of proving that A. was the agent of the H. M. Co. in drawing the bill. *Held, also*: that B was not warranted in presuming authority in A. to draw the bill, because he had once before drawn a similar bill, which had been honored, or because he had checked against the funds of the H. M. Co. *Held, also*: that the telegram did not authorize A. to draw in the name of the H. M. Co., but only in his own name for a particular purpose. *Bank of Deer Lodge v. Hope Co.*, 443

4. *Authority to make notes.*—A general agent, without being specially empowered so to do has no authority to make promissory notes in the name of his principal. A Michigan mine belonged to a corporation, whose financial office was in New York. The general agent in Michigan was accustomed to indorse the company's paper for collection or discount, and to draw on the treasurer in New York for the current needs of the corporation, and his drafts were duly paid: *Held*, that this could not imply authority in the agent to make promissory notes in the name of the corporation. *New York Mine v. Bank*, 453

5. *Notes—Caution in buying.*—Notes made by an agent in the name of his principal, to his own order, suggest an interest adverse to his principal, and upon their face suggest the necessity for special caution on the part of a purchaser in demanding the authority to make them. *Id.*

6. *Repudiating note.*—It is competent for a corporation to show, in making defense to paper issued in its name but alleged to be unauthorized, that immediately on its existence becoming known, its validity was formally repudiated. *Id.*

See AGENT. 15.

BOND—See TITLE BOND.

BOUNDARIES.

1. *Boundaries must be marked and can not be changed.*—Before the passage of the U. S. acts now in force, the staking of the boundaries of lode claims was not customary, but under those acts it is essential; and when the boundaries are so defined, they can not be changed to the injury of any intervening locator, but (suggested) that a district rule allowing a reasonable time to ascertain the course of the vein before fixing boundaries, would not be invalid. *Golden Fleece Co. v. Cable Co.*, 120

2. *Jurisdiction—Boundaries.*—The court of chancery may entertain a bill to settle boundaries between coal mines, after a recovery in ejectment, but will not order an account in such case in favor of the party out of possession. *Sayer v. Pierce*, 72

CLAIM.

1. *Invalid water claim.*—A claim of water merely for speculation, and not intended for any useful purpose, is invalid. *Weaver v. Eureka Co.*, 642

2. *Claim, how lost.*—The right to a mining claim acquired by appropriation and occupancy may be lost: 1. By forfeiture under the district rules. 2. Where no district rules exist, by failure to work the claim with reasonable diligence. 3. By abandonment. *Mallett v. Uncle Sam Co.*, 17

COMMISSIONS—See AGENT, 48-50.

CONTINUANCE—See PLEADING AND PRACTICE, 3.

CONTRACT.

1. *Excessive loan of national bank not void.*—A borrower can not avoid the payment of money actually loaned to him by a national bank, because the sum received exceeds one tenth of the capital stock of the bank. *Union Co. v. R. Mt. Bank*, 432

2. *Notice of termination of contract.*—Plaintiffs' contract was subject to termination on six months' notice being given on either side from any period. *Held*, that the notice contemplated by the contract, was notice from the corporation organized and doing business in California, and not notice of instructions from the committee of the London agency. *Bates v. Sierra Nevada Co.*, 345

CONVEYANCE.

1. *Letters of agent to explain deed.*—A deed purported to convey all the "lands now in the occupation of widow Kellett and sons," the deed being the consummation of a contract commenced by a series of letters of the grantor's steward, who was an active agent in the transaction, and had witnessed the deed. *Held*, that the letters were admissible in evidence to explain the latent ambiguity in the deed. *Beaumont v. Field*, 281

2. *Release of warranty is a deed* concerning lands admissible to record, and may be proved in evidence under the recording acts. *Susquehanna Co. v. Quick*, 201

3. *Title, how passed.*—The title to mining property, considered as real estate, can pass only by deed or last will and testament. A wish expressed by H. shortly before his death, that his property should go to his mother, was ineffectual to pass the title. A delivery of the possession of the property to the agent of the mother by the holder of the legal title, would at the utmost only be a license, which, until revoked, would justify her entry and receipt of the profits. *Hardenbergh v. Bacon*, 352

4. *Deed unacknowledged.*—Under the statutes of Montana, a deed is good if acknowledged, without proof of execution; or if not acknowledged but accompanied by proof of execution; and in either event when recorded, it imports notice to the world. *Belk v. Meagher*, 522

5. *Seal—Written instrument as evidence.*—The characters [L. S.] added to a signature do not constitute a seal unless there is something in the body of the instrument expressive of the intent to make it a sealed in-

CONVEYANCE. *Continued.*

strument, but a general objection will not exclude it when offered in evidence, unless on its face inadmissible or void; though such a paper may not be admissible to prove title, because it is doubtful on its face whether it is the deed of the principal or of the agent executing it, yet it may be admissible to show the date of plaintiffs' possession, and also to show a surrender of possession to him by the actual occupant. *McDonald v. Bear River Co.*, 626

See AGENT, 42-45; DELIVERY, 1, 2.

CORPORATION.

1. *Trustee holding salaried office.*—A trustee of a corporation who has performed services and earned a salary as treasurer under contract with the company, can not, in the absence of fraud, be deprived of such salary, on the ground that the by-laws forbid the trustee holding any other office. *Neall v. Hill*, 80

2. *No dissolution by decree.*—A court of equity may compel the officers of a corporation to account, or may restrain the violation of trusts by such officers, but can not dissolve the corporation or make a decree which would indirectly necessitate such a result. *Id.*

3. *Damages for depreciation of stock* can not be charged against the officers of a corporation except in a clear case based on gross neglect or willful misconduct. *Id.*

4. *Corporate powers under charter—Smelting works, houses, etc., as incidentals.*—The Rossie Lead Mining Company, a corporation, purchased a large amount of property, which had been previously used by the vendor in the business of washing and smelting lead ore, among which property was a house and lot, fifty acres of improved land, with several houses thereon, a school-house, threshing machine, etc. *Held*, in an action on a note for the purchase money, that the purchase of such items, in connection with the purchase of the smelting works, was not necessarily an excess of the power granted by the charter, and that such items might be incidentally employed in carrying on large mining operations. *Mess v. Rossie Co.*, 289

See AGENT, 16-19, 30; EVIDENCE, 14, 15; PARTNERSHIP, 1; QUO WARRANTO, 1.

DAM.

1. *Appropriation by damming.*—A dam across a natural water-course is an actual appropriation of the water at that point, but not below it, even though the water flowing over the dam has been brought into the water-course by ditches constructed by the owners of the dam. *Kelly v. Natoma Co.*, 592

2. *Damnum absque injuria.*—Defendants erected dams at the outlet of certain lakes, resulting in injuries to the plaintiffs, but attempted to justify on the ground that the reservoirs thus created were of great value. *Held*, that if the injuries were trivial they might be considered *damnum*

DAM. *Continued.*

absque injuria; but that the legal superiority of conflicting rights could not be determined by a comparison of their values. *Weaver v. Eureka Co.*, 642

DEFAULT—See PLEADING AND PRACTICE, 4, 5.

DELIVERY.

1. *Sale of timber—Delivery—Measurement—Title.*—Where an amount of timber was identified and sold at a given price per foot, and put under the control and subject to the direction of the purchaser, it was held the sale was complete; the measurement not being necessary in such case to pass title, and none but a constructive delivery being possible. *Adams Co. v. Senter*, 241

2. *Sale—Subsequent notice.*—Such a sale could not be revoked by any subsequent notice. *Id.*

DEPOSITION.

1. *Exhibit to deposition.*—A paper, found pinned to a deposition, not referred to in or about the deposition, and not aided by parol testimony, is not an exhibit so identified as to be admissible. *Susquehanna R. R. Co. v. Quick*, 201

2. *Release to witness.*—But such paper, being a release of warranty to the witness, being otherwise proved, is admissible, independent of the deposition. *Id.*

DIP.

1. *Location—Dip.*—The lines of a location should be parallel with the top of the lode, and if the line of the lode departs from the surface lines of the location, the locator takes no part that lies without such surface lines; but if the lode in its downward course into the earth departs from the lines upon the side, the locator takes that part also. *Stevens v. Williams*, 557

2. *Locator may follow dip of lode.*—If a location is made upon the top or apex of a vein, the law gives the miner the whole of the vein, wherever it may go; he may follow it to any depth, although in its downward course it may enter the land adjoining. *Iron Silver M. Co. v. Murphy*, 548

3. *Following vein.*—Where there is a true apex within the surface boundaries of a claim, the claimant can follow the vein in its downward dip beyond his vertical side lines, and he may follow the vein beyond such side lines at any point where the apex is within his surface lines, even though his location for the full length of the claim be not along the line of such apex; and he is entitled to follow the same in its departure from the perpendicular, in any degree, until it reaches the horizontal. *Stevens v. Williams*, 566

4. *Perpendicular.*—A lode which has an inclination of more than forty-five degrees from the vertical course, departs from the perpendicular, and it is merely a verbal distinction to say that such a lode departs from the horizontal plane. *Stevens v. Williams*, 557

DIP. *Continued.*

5. *Burden of proof.*—The burden of proof is upon the plaintiffs (claiming the right of dip beyond their lines) both because they are the plaintiffs, and because they are seeking to go out of their own territory into that claimed by others. *Stevens v. Gill*, 576

See APEX, 5.

DISTRICT RULES.

1. *Regularity of district rules.*—The courts will not inquire into the regularity of the modes by which miners adopt their local laws, unless fraud or some other like cause be shown for rejecting the same. It is enough that they agree upon their laws. *Gore v. McBrayer*, 645

2. *Continued observance.*—To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply with the mining rules and customs established and in force in the district where the claim is situated. *Oreamuno Co. v. Uncle Sam Co.*, 32

3. *District rules—Judicial recognition—Appropriation.*—The mining laws when once established and recognized by the courts (and in Nevada by statute), have the force and obligation of legislative enactments, and where courts presume title in the first appropriator, it can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired. *Mallett v. Uncle Sam Co.*, 17

4. *Location—Forfeiture.*—When the district laws point out directly how mining claims must be located, and how the possession once acquired is to be maintained, that course must be strictly pursued, and a failure to do so might work a forfeiture of the ground. *Id.*

5. *District organization not essential.* District rules not in conflict with State or Federal legislation are recognized, but the existence of a mining district or of district rules is not essential to validate a location. *Golden Fleece Co. v. Cable Co.*, 120

See APPROPRIATION, 17; FORFEITURE, 1.

DITCH.

1. *Location of ditch—Relation.*—Where parties projecting a ditch give notice in the usual manner, designate the line of the ditch by the usual marks, and prosecute work with reasonable diligence until the same is ready to receive water, they are entitled to such water as against all intervening or subsequent claimants. The title to water conveyed through a ditch constructed in the usual manner, and completed with reasonable diligence, relates, on completion, to the first act of appropriation. *Kimball v. Gearhart*, 615

2. *Due diligence—Local considerations.*—The pecuniary inability of parties projecting a ditch is not an excuse for failure to complete it in a reasonable time. In determining the question of diligence in the construction of a ditch the jury may rightfully consider the circumstances surrounding the parties at the date of appropriation, such as the nature of the climate and country, as well as the difficulty of procuring labor and materials. *Id.*

DITCH. *Continued.*

3. *The prior construction of a ditch for drainage purposes* is not an appropriation of the water as against others who wish it for useful purposes; but if at the time of such construction it was the intention to appropriate the water for useful purposes, and such intention was afterward carried out, then the appropriation dates from the construction of the ditch. *Maeris v. Bicknell*, 601

4. *A change in the use of water* from one mining locality to another, by the extension of the ditch, or the construction of branches, would not affect the prior right of the appropriation. *Id.*

5. *Evidence of sale of ditch.*—The sale of a ditch can not be proved by oral testimony, but only by deed. *Smith v. O'Hara*, 671

See NEGLIGENCE, 1; WATER.

EJECTMENT.

1. *Outstanding title.*—Defendant, in ejectment for a mining claim, may show a conveyance by plaintiff or plaintiff's grantor, prior to the bringing of the action, to show as a defense that plaintiff has no title through the chain of title by which he claims. A naked trespasser can not show outstanding title in a third party, except as a means of showing the want of all title in the plaintiff. *Mallett v. Uncle Sam Co.*, 17

2. *Title in third party.*—The rule that an outstanding title in a third party will prevent a recovery by plaintiff, does not apply where both parties claim by mere possession. *Richardson v. McNulty*, 11

EMINENT DOMAIN.

1. *Condemnation of land in aid of mining.*—Plaintiffs sought to condemn and appropriate the defendant's land, for the purpose of sinking a vertical shaft, with which to develop the Comstock lode. The testimony showed that no other lands could be selected, except at great expense, and at places inaccessible to a railroad, or to wagon roads, without which the business of plaintiff could not be successfully conducted. *Held*, that a necessity existed for the condemnation of defendant's land, in order to advance the mining interests of Storey county, and that it presented a proper case for the exercise of the law of eminent domain. *Overman Co. v. Corcoran*, 691

2. *Constitutionality of Nevada Act.*—The act of the legislature of Nevada approved March 1, 1875, entitled "An act to encourage the mining, milling, smelting, or other reduction of ore in the State of Nevada," is constitutional. *Id.*

EQUITY.

1. *When court of equity will interfere.*—Whether, upon a petition or bill asserting that the prior rights of the first appropriator have been invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which

EQUITY. Continued.

ordinarily govern a court of equity in the exercise of its preventive process of injunction. *Atchison v. Peterson*, 583

2. *Law and equity jurisdiction.*—The organic act of Montana clothes the Supreme and District Courts with both common law and chancery jurisdiction, but in judicial proceedings the distinctions between law and equity must be maintained, and the court can not lawfully exercise both of these separate functions in the same proceeding. Hence a trial by jury, with verdict and judgment for damages, coupled with a decree enjoining defendants from using certain water, is a proceeding which partakes both of the nature of law and equity, and is irregular and illegal throughout. *Woolman v. Garringer*, 675

3. *Law and equity.*—In Montana the formal distinctions in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed. The findings of a jury in an equity case are merely advisory, and whether the court will follow them depends on whether it is satisfied with the verdict. *Basey v. Gallagher*, 683

4. *Novelty—Equity.*—A court of equity acknowledges and adapts itself to the novelties which arise from the diversified transactions of men. *Dougherty v. Creary*, 35

5. *Bill in equity—Verdict*—In a suit under § 738 of the Code of Civil Procedure, the complaint is to be treated as a bill in equity, and the general verdict of a jury will be disregarded. *Brandt v. Wheaton*, 145

6. *Practice in chancery—Disregarding findings of jury.*—The power to disregard or modify the findings of a jury in a chancery cause is inherent in the court, the object of the verdict being not to decide the case, but to instruct or advise the conscience of the chancellor; and it is no reason for disturbing the action of the court that in passing upon the whole case it disregarded the findings of the jury. *Smith v. Richardson*, 139

See CORPORATION, 2; PARTNERSHIP, 4.

ESTOPPEL.

1. *Suit pending—Statute of limitations.*—F. commenced suit in support of an adverse claim under the mining act of Congress of 1872 (R. S. § 2326). *Held*, that the pendency of a former suit to recover possession of the mining claim in which F. was defendant would not estop B., the former plaintiff and present defendant, from claiming the benefit of the statute of limitations, although B. had averred in his complaint that F. was in possession. *420 Mining Co. v. Bullion Co.*, 114

2. *Admission not acted on, is no estoppel.*—In an action to compel defendant to account to plaintiffs for money subscribed and paid by them, and which he as their agent was to invest in oil lands to be owned by the subscribers as a company, the defendant is not estopped to deny that he has received the whole amount of said subscriptions, by the fact that in a report made to the subscribers, he stated that he had received the whole; no one of them having advanced any money, or changed his position in consequence of such statement. *Collins v. Case*, 91

EVIDENCE.

1. *Diversion of water*.—Where parties go to issue in actions for the diversion of water, upon general averments and denials of title, anything that legally attacks or supports the respective titles is admissible in evidence. *Kimball v. Gearhart*, 615

2. *Admission of title-papers, when location disputed*.—The court can not exclude conveyances offered in evidence, upon the grounds of invalidity in the location upon which they are based, when the validity of such location is at issue before the jury, depending upon a question of fact, which it is for the jury to decide. *Golden Fleece Co. v. Cable Co.*, 120

3. *Admissions of grantor do not bind grantee*.—One who has conveyed his interest can not make admissions binding upon his grantees, as to the invalidity of his location. The admissions of such a party that he was an alien would not be evidence; and his testimony when examined as a witness is not conclusive, so as to justify the court in acting upon his alienage as a fact, before the jury have passed on the issue. *Id.*

4. *Admissions by defendant's agents*.—To admissions by a director, and by the succeeding agent of the company, a general objection was made below. Such objection can not be made specific above. If their want of authority to bind the company had been suggested below, it might have been proved. *Consolidated Gregory Co. v. Raber*, 405

5. *Credibility of witnesses*.—The testimony being conflicting with regard to the existence of an agency, all questions relative to the credibility of the witnesses are for the court below. *Hardenbergh v. Bacon*, 352

6. *Cross-examination—Trustworthiness of evidence*.—The object of cross-examination is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained. Evidence which conceals a part of the transaction is defective. Any question which fills up such omission is legitimate.

The question put to witness on cross-examination, whether he had not admitted his fraud in the issue of negotiable paper should have been allowed, as bearing directly on the trustworthiness of his evidence. *New York Mine v. First Nat. Bank*, 454

7. *Matters of privilege*.—The agent, in order to reduce the amount of his earnings in the other employment, set up a loss sustained by him through one of his customers: *Held*, that the witness was not privileged from disclosing, upon cross-examination, the name of such customer. *Williams v. Chicago Coal Co.*, 398

8. *Leading question defined*.—A leading question is one which indicates the answer which the party desires. *Susquehanna Co. v. Quick*, 202

9. *Rebuttal defined*.—Rebutting evidence is such as explains or counteracts evidence that comes out on the defense. That is not rebutting testimony which mainly supports the case stated in the complaint, and only incidentally explains or repels the evidence in behalf of the defense. *Smith v. Richardson*, 139

10. *Copy of notice as evidence*.—A copy of the notice of appropriation prepared with the knowledge of the appropriators, seen by some of them as a posted notice, and posted where it must have been seen by others, is

EVIDENCE. *Continued.*

admissible in evidence to show the limited character of the appropriation. *McKinney v. Smith*, 650

11. *Lost paper supplied by copy.*—A witness testified that a certain paper had been sent to some attorney several years ago, and after search could not be found. *Held*, sufficient proof of loss to let in the copy produced. *Susquehanna Co. v. Quick*, 202

12. *Lost records, how proved.*—By an act of the legislature, all mining district records were required to be deposited in the office of the respective county recorders. Under this law the records of Summit Valley district were deposited in the office of the recorder of Deer Lodge county, who had them copied into a book of records. The original record of the location of a lode was subsequently lost. *Held*, that the copy was the best evidence, and of higher grade than the memory of witnesses. *Belk v. Meagher*, 522

13. *Proof of lost records.*—The original record of a location certificate having been lost, it is competent to prove the record by a book transcribed from the original, and for years recognized as part of the official records. *Belk v. Meagher*, 510

14. *Corporation books.*—Entries from the stock ledger and company books *held* competent to show the amount of stock issued; and that it included the stock allotted to this block, and to show the transactions of the company in respect thereto. *Chapman v. Porter*, 102

15. *Ratification of purchase by officers—Evidence.*—When a mining corporation allowed two of its officers to purchase property, and afterward received and operated the property, *held*, a ratification of the purchase, even if originally made without authority, and that the corporation was liable on its notes for the purchase money given by such officers. *Held, further*, that in a suit brought to recover upon one of the notes, the plaintiff might show he had obtained judgment by default against the corporation upon another of them, by way of fortifying the evidence of ratification. *Moss v. Rossie Co.*, 290

16. *Interested witness.*—A defendant who has suffered a default in suit, upon a note, will not be allowed to testify that he was authorized by his co-defendant to sign the same note, when by so doing he would reduce the amount of the judgment against himself. *Washburn v. Alden*, 320

17. *Witness.*—To make the testimony of a witness admissible, he must have been competent at the time of the taking of his deposition. It is of no importance that he is competent afterward, as it is the effect of the interest on the witness which disqualifies him. *Kimball v. Gearhart*, 615

See DEPOSITION, 1, 2. PLEADING AND PRACTICE, 12.

FORCIBLE ENTRY.

1. *Possession after forfeiture.*—The original locator will not be justified in making a forcible entry on mining ground, after forfeiture incurred, while it is in the possession of one who has entered, seeking to relocate it for the forfeiture. *Slavonian M. Co. v. Perasich*, 541

See ANNUAL LABOR, 5; POSSESSION, 5.

FORFEITURE.

1. *District rules—Forfeiture.*—The neglect to comply with a district rule does not operate to work a forfeiture, unless the district rule so provide. *Bell v. Bed Rock Co.*, 45

2. *Forfeiture—Burden of proof.*—A party who insists upon forfeiture or abandonment, and relies thereon to build up a right in himself to the thing, franchise or easement forfeited or abandoned, is upon first principles bound to establish the fact or facts upon which his asserted claim or right depends. *Oreamuno Co. v. Uncle Sam Co.*, 32

3. *Pleading.*—Forfeiture must be specially pleaded. Abandonment may be proved under the general issue. *Morenhaut v. Wilson*, 53

See ABANDONMENT; CLAIM, 2; DISTRICT RULES, 4.

FORMER RECOVERY.

1. *Former recovery no bar, when.*—A former recovery is no bar to an action, when the causes of action are not the same, though many of the facts in the two actions are identical. *Hardeenbhrig v. Bacon*, 35₂

FRAUD.

1. *Concealment of facts by agent avoids sale from principal to him.*—V., who had a supervisory control over certain mineral lands belonging to T., employed N. to take charge of the lands, collect rents, pay taxes, etc. Developments upon the land justified the belief that it contained rich diggings. N. proposed to V. to purchase the land of T. for \$2,000 and accrued rents. V., acting as N.'s agent for this purpose, purchased the land at \$1,500, but concealed from T. all knowledge of the terms of N.'s offer, and of the increasing value of the land. Upon suit brought to set aside the deed to N., and also a deed from N. to F., who had full knowledge of the transaction, it was *held* that N. was the agent of T., and good faith required him to communicate to T. all important facts relating to the land; that his purchase of the land without so doing was a fraud upon T.; that the sale would be set aside, and that F., having purchased with full knowledge, was substantially a party with N. *Norris v. Tayloe*, 383

See ACCOUNT, 4, 8, 9, 15; AGENT, 33, 35, 39, 40.

INJUNCTION.

1. *Waste—Trespass.*—Courts of equity do not now make distinctions between trespass and waste, but will apply the remedy by injunction wherever a trespass is attended with irreparable mischief or a multiplicity of suits, the same as if it were a technical waste, and this doctrine is particularly applicable to the case of a continued trespass upon a placer gold mine. *Chapman v. Toy Long*, 497

2. *Cutting ditch enjoined.*—Repeatedly cutting a mining ditch is a destructive trespass liable to be enjoined in the exercise of the power of a court of equity. *Derry v. Ross*, 1

See ACCOUNT, 7; RECEIVER, 1.

INTEREST—See ACCOUNT, 13.

JUDGMENT—See PLEADING AND PRACTICE, 9, 10, 11.

JURISDICTION.

1. *Jurisdiction of inferior courts—Presumptions—Service.*—A judgment of a court of special and limited jurisdiction should not be admitted in evidence to show title to property obtained under it, until the facts necessary to confer jurisdiction are affirmatively shown; nothing is presumed in favor of the jurisdiction of inferior courts, and it is imperatively necessary that due and legal service of summons upon the defendants should be shown. *Mallett v. Uncle Sam Co.*, 18

JUROR.

1. *Competency of juror.*—A juror in a civil action, who, on his *voir dire*, expresses an entire willingness, as well as ability to accept the facts as they shall be developed by the evidence, and to render a verdict in accordance with them, can not be challenged for cause, for the reason that he had previously conversed with another party in relation to the facts of the case, and had received from him an impression in relation to them. *Union M. Co. v. Rocky Mt. Bk.*, 432

2. *Discretion of court in rejecting juror not challenged.*—It is no ground for error that the court set aside two jurors, without any challenge, because upon their examination they did not appear to be entirely impartial, and excused a third who did not fully understand the English language and was partially deaf; especially when no objection was taken to the competency of the jury obtained. The court may in its discretion reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause. *Atlas Co. v. Johnston*, 388

JURISDICTION—See ADVERSE CLAIM, 1, 2, 3; BOUNDARIES, 2.

LOCATION.

1. *Mineral must be first discovered.*—No valid location of a mining claim can be made, until a vein or deposit of gold, silver, or metalliferous ore or rock in place has been discovered. *Overman Co. v. Corcoran*, 691

2. *Location notice.*—A notice is evidence of possession, but of itself, alone, is not sufficient. Taken with other acts, it amounts to sufficient evidence. It forms one of a series of acts, which taken together, make the right perfect. *Thompson v. Lee*, 611

3. *Staking.*—Staking boundaries does not of itself amount to a location. *Golden Fleece Co. v. Cable Co.*, 120

4. *Practice in equity.*—Parties seeking the protection of a court of equity against alleged trespassers upon a mining claim must show a substantial compliance with the law authorizing the location thereof. *Chapman v. Toy Long*, 497

5. *Placers.*—Parties may locate and occupy placers jointly. *Id.*

See APEX, 3, 4; BOUNDARIES, 1; DIP, 1; DITCH, 1; RECORD, 1.

LODE.

1. *Part of lode detached becomes a distinct lode.*—If one part of a lode be detached from another by a movement of the country after the lode was deposited, that circumstance will give it individuality, and if it carries ore it may be taken and held as a distinct lode. *Iron Silver M. Co. v. Murphy*, 548

LODE. *Continued.*

2. *Lode or ledge defined.*—A vein, lode or ledge, within the meaning of the act of Congress, is a mineral body of rock within defined boundaries in the general mass of the mountain. *Stevens v. Williams*, 566

3. *Lode in place.*—A lode is in place when it is inclosed and embraced in the general mass of the mountain, and fixed and immovable in that position, and it is not material that the vein matter is loose and disintegrated. *Stevens v. Williams*, 557

4. *Contact veins.*—If the deposits of ore are irregular along the line of contact of two kinds of rock, as porphyry and limestone, a lode can not be said to exist if the contact is barren of mineral or ore, for any considerable distance; but if there is a practically continuous body of ore, and no such interruption as exhibits other than a casual and fortuitous displacement, then it would be a lode. *Id.*

See APEX.

MILL SITE.

1. *Mill and mill privileges—Transfer of possession.*—Right to water acquired by appropriation may be transferred like other property, and the transfer of a mill carries its water privileges. As applied in this case, a transfer of possession without deed was held good against an intervening appropriation between the first appropriation and the time of the transfer. *McDonald v. Bear River Co.*, 626

2. *Water—Use for mill purposes.*—The interest in water acquired by one who locates on the bank of a stream and appropriates the waters of the same for machinery, is not property in the water as such, but the right to the momentum of its fall at the point of location, and to the flow of the water in its natural course above. *McDonald v. Askeu*, 660

3. *Sale of water by mill owner.*—A person who has built a mill on a stream and appropriated a part of its water to propel machinery, does not lose his prior right over one who has claimed the water below him for mining purposes, by a sale of his interest in the water of the stream to be used in a ditch above. *Id.*

See ADVERSE CLAIM, 6.

MINES.

1. *Land.*—Mines are land. The mineral right, after severance from the surface title, is land. *Caldwell v. Copeland*, 189

2. *California Precedents.*—The decisions of the Supreme Court of California, referred to as establishing a system of common law upon the questions peculiar to the occupation of the mineral lands upon the public domain. *Mallett v. Uncle Sam Co.*, 17

See AGRICULTURAL LAND, 1; POSSESSION, 6.

MORTGAGE.

1. *Facts of the case—Assignee of mortgage distinguished from purchaser without notice.*—Sherman held a mortgage upon the property of the Cumberland Co. of which he was a director and a few days after its acknowledgment became one of three trustees in a trust deed, securing (among other claims) one of an amount nearly the same as that men-

MORTGAGE. Continued.

tioned in the mortgage, to Sherman himself. The company claimed that the two amounts were the same debt upon which the proof was found to be with the company. The mortgage had been assigned to Parish who sought to foreclose it, but it was *held*, that an assignee does not stand in the position of a purchaser without notice, even if he may have taken the same without knowledge of any defense. *Cumberland Co. v. Parish*, 423

See ACCOUNT, 5, 11.

NEGLIGENCE.

1. *Tapping swollen ditch.*—Where a swollen ditch crosses natural ravines into which the owner might have harmlessly turned off the excess of the flood, but instead, he taps his ditch so as to flood a farm, these facts will justify a verdict imputing negligence. *Turner v. Tuolumne Co.*, 107

NEW TRIAL—See PLEADING AND PRACTICE, 13, 15, 16.

NOTICE—See ADVERSE POSSESSION, 12, 13; APPROPRIATION, 11; LOCATION, 2.

OFFICER.

1. *Officers de facto.*—The selectmen of the county of Carson assumed the power to appoint certain persons to the offices of justice of the peace and constable without warrant, but they were commissioned by the governor of Utah Territory, who was authorized to issue such commissions, and they acted in their respective capacities under such commissions. *Held*, that they were officers *de facto*, and their acts as to third persons valid. *Mallett v. Uncle Sam Co.*, 17

OCCUPATION—See POSSESSION.

PARTNERSHIP.

1. *Distinction between corporate and partnership liability.*—A general agent in Michigan, and a financial agent in New York, were the only stockholders having beneficial interests in their corporation. In a suit to collect promissory notes, made by the agent in the corporate name, the holder claimed that the corporation had had no meetings for several years; that the agent in Michigan had managed the business exclusively there, and that he and the officer in New York, who acted as president and treasurer, had conducted affairs as if they were partners, and ought therefore to be held as having fully authorized each other to exercise all powers that partners might exercise. *Held*, that as it did not appear that plaintiff was influenced by the neglect to observe the formalities of the corporation, and as there was no pretense that he had dealt with them as partners, but the notes declared on purported to be corporate notes, the facts stated were immaterial, and plaintiff must make out a case on grounds which would establish a corporate, not a partnership, liability. *New York Mine v. First National Bank*, 453

2. *Co-tenants working a mine are partners.*—*Dougherty v. Crary*, 35

3. *The majority in interest*, and not the majority of persons, has the right of control in the working of claims where all parties can not agree. *Id.*

PARTNERSHIP. *Continued.*

4. *Equity*.—The abuse of such right affords grounds for relief in equity. *Id.*

5. *Ratification by partner*.—When an act is done for the benefit of a partnership, a subsequent ratification of it during the partnership by one of the members, is a ratification by all. *Lyell v. Sanborn*, 313
See ACCOUNT, 16, 23.

PATENT.—See AGRICULTURAL LAND, 2; WATER, 8.

PLACERS.—See LOCATION, 5.

PLEADING AND PRACTICE.

1. *Service on agent without showing the fact of agency*.—In a suit against a mining company, the sheriff made the following return of service: "I served the within summons by reading the same to Rodman Carter, and delivering to him a copy thereof; also delivered to him a copy of complaint. All done in Edgerton county, M. T., December 9, 1867." The plaintiff sought to remedy the defective service by filing affidavits of third parties that Carter was managing agent of the company. *Held*, that the usual way of proving service is by the return of the officer himself, or by the written acknowledgment of the party served. That the attempt to amend service by affidavits of third parties is doubtful practice; but when such parties do not pretend to know that the sheriff served the particular individual described, it is certainly improper practice; and that an affidavit which sets forth that Carter told affiant what position he held in the company, is hearsay testimony. *Brown v. Gaston Co.*, 376

2. *General agent*.—Service upon one in the employ of a company, but not its general managing agent, is not sufficient service on the company. *Id.*

3. *Continuance—Discretion of court*.—An affidavit for a continuance on the ground of the absence of material witnesses failed to give their names, or to state what was expected to be proved by them. *Held*, that a motion for a continuance based on this affidavit was addressed to the discretion of the court, and that the discretion was not improperly exercised in denying the motion. *Carey v. Philadelphia Co.*, 349

4. *Practice—Default set aside, when*.—A defendant who has been properly served with summons, and has suffered a default, should not be allowed to come in and answer without an affidavit of excusable neglect, and of merits. *Lamb v. Gaston Co.*, 381

5. *Practice—Vacating judgment—Default set aside*.—It is not error for the court to sustain a motion to vacate a judgment and set aside a default, and allow the defendant to make answer to the merits of the complaint, when the service of summons is defective. *Brown v. Gaston Co.*, 376

6. *Striking out part of answer*.—Upon suit for services under a contract defendant answered that plaintiff had violated his contract, and also alleged certain torts by him committed in slandering the credit of the company. *Held*, that the allegations of tort were properly stricken from the answer. *Bates v. Sierra Nevada L. Co.*, 345

PLEADING AND PRACTICE. *Continued.*

7. *Exceptions to evidence.*—An objection to evidence not followed by an exception amounts to acquiescence in the ruling. *Turner v. Tuolumne Co.*, 107

8. *Answer—Shifting burden of proof.*—An answer which is not responsive to the complaint makes no issue. When the complaint which is not denied makes out a *prima facie* case, the burden is upon the defense to sustain their affirmative allegations. *Thompson v. Lee*, 610

9. *Final judgment.*—A judgment providing, in addition to its other terms, that an account be taken, is nevertheless a final judgment, from which an appeal may be taken. *Neall v. Hill*, 80

10. *Judgment in coin.*—Upon a coin contract, the judgment should be for the amount stated in coin, payable in coin, with costs payable in currency. *Wild v. New York Co.*, 413

11. *A single erroneous instruction* is sufficient to reverse, unless upon the whole case the judgment ought to stand. *Richardson v. McNulty*, 11

12. *Improper testimony cured by instructions.*—Where testimony is improperly admitted, but afterward excluded by instructions, it may not, under all circumstances, amount to error sufficient to entitle to a new trial. *Yankee Jim Co. v. Crary*, 196

13. *New trial—Attorney's affidavit.*—The court properly refused to grant a new trial upon the affidavit of the attorney of record that he and defendants were absent from the trial because of an oral agreement by opposing counsel to give notice of the day of trial; when met with counter affidavits denying such agreement, and when other counsel did appear for defendants and contested the case. *McDonald v. Bear River Co.*, 626

14. *Pleading—Complaint.*—In an action against alleged trespassers for the diversion of water, it is sufficient to aver the possession by plaintiffs of the land, and the subject of the inquiry. *Id.*

15. *New trial.*—A new trial will not be granted for the purpose of having the language of a finding made more exact, when it is sufficiently distinct as to the subject-matter of the action. *McKinney v. Smith*, 650

16. *New trial.*—The rejection of material testimony in rebuttal is a proper ground for new trial. *Smith v. Richardson*, 139

17. *Non-joinder of all co-tenants.*—Plaintiffs being tenants in common, may maintain "an action for the recovery of the land without joining their co-tenants." *Morenhaut v. Wilson*, 53

18. *Insufficient findings.*—The findings in this case, specially upon the question of possession, *held*, not sufficiently definite to justify judgment for either party. *Id.*

19. *Conflict in testimony—Finding.*—When there is a substantial conflict in the testimony, the findings of the lower court will be held to be sustained by the evidence. *Overman Co. v. Corcoran*, 691

20. *Rebuttal.*—After defendant has proved an adverse possession, the plaintiff may show that it was not continuous or uninterrupted, but may not return upon his original proof, unless in a case addressed to the discretion of the court. *Yankee Jim Co. v. Crary*, 196

21. *Water rights—Verdict of jury.*—The question of diligence in

PLEADING AND PRACTICE. *Continued.*

making surveys and constructing ditches for the appropriation of water being submitted to a jury, for the purpose of determining whether plaintiffs' claim would date from the commencement of their operations, and the evidence being conflicting, their verdict was held to be conclusive.

Weaver v. Eureka Co., 642

22. *Appeal—Weight of evidence.*—The appellate court will not interfere with the verdict of a jury on the ground that it is against the weight of evidence, except in extraordinary cases. *Kimball v. Gearhart*, 615

23. *Presumption as to evidence in bill of exceptions.*—Where a particular point is raised by a bill of exceptions, and evidence is set out in the bill as bearing, or evidently tending to bear, upon that point, it is proper to infer that no evidence was given which would alter the effect of that which is stated. *Atlas Co. v. Johnston*, 389

24. *Quotient verdict.*—An agreement among jurors to divide by twelve the aggregate of the amounts suggested by each juror on his ballot, and to render a verdict for the quotient without further discussion, results in a vicious verdict, voidable under the Practice Act; but if they ballot in that manner without agreeing to be bound by the result, the verdict so found is good. *Turner v. Tuolumne Co.*, 107

25. *Affidavits of jurors.*—Such a verdict, not being a *chance* verdict, can not be impeached by the affidavits of jurors under the statute. *Id.*

26. *Waiver of demurrer.*—The defendant having first demurred and subsequently answered, and the record failing to show what was done with the demurrer, it will be presumed that it was abandoned. *Basey v. Gallagher*, 683

27. *Assignment of errors.*—Grounds of appeal not set forth in the statement will not be considered on appeal. *Wixon v. Bear River Co.*, 656

28. *Practice on appeal.*—Nothing which occurred in the progress of the trial below can be assigned for error in the Supreme Court, which was not brought to the attention of the court and decided by it. *Belk v. Meagher*, 510

29. *Judgment not reversed.*—A judgment will not be reversed for a mere formal error in the proceedings of the court below, which does not affect the merits of the case. *Lyell v. Sanborn*, 313

30. *Remittitur—Costs.*—Damages in excess of the evidence may be remitted in the appellate court, the appellant being allowed his costs. *Cons. Gregory Co. v. Raber*, 405

See ABANDONMENT, 15, 25; AGENT, 41; EQUITY; FORFEITURE, 3; LOCATION, 4.

POSSESSION.

1. *Facts amounting to possession.*—Proof of a surface claim marked by a U. S. surveyor, including a lode running with the claim, worked within the surface lines, is a sufficient showing of possession on the part of plaintiff to put the defendant on proof of his right. *Golden Fleece Co. v. Cable Co.*, 120

2. *Location notice* without staking boundaries, does not amount either to constructive or actual possession. *Morenhaut v. Wilson*, 53

POSSESSION. *Continued.*

3. *Occupation from day to day, not essential.*—The court charged that if the land was chiefly valuable for timber and mining, its use for such purposes was sufficient as the basis of a prescriptive title, but added that such use “must be *continuous*, that is, from *day to day*, *month to month*, and from *year to year*”: *Held*, error, upon the facts of the case. *Satterfield v. Randall*, 219

4. *Presumption arising from possession.*—As against a mere trespasser, one in possession of a portion of public land will be presumed to be the owner. *Brandt v. Wheaton*, 145

5. *Forcible entry.*—The writ of restitution obtained in an action of forcible entry and detainer simply decides a restoration to immediate possession, and does not decide the right of property or the right of possession. *Mitchell v. Hagood*, 506

6. *Title to mining lands.*—The locator of a mining claim has the exclusive right to the possession and enjoyment of the same, and he has a legal, as distinguished from an equitable title. *Basey v. Gallagher*, 633

See ACCOUNT, 6; ADVERSE CLAIM, 4, 5; TENANT IN COMMON, 1, 2.

PRESCRIPTION.

1. *Prescription distinguished from adverse possession.*—Prescription may give the right to work a particular mine, but can not give title to the mine. Prescription refers to hereditaments incorporeal only, but the title to a mine as land, must be made out by documentary evidence or adverse possession. *Caldwell v. Copeland*, 189

See ADVERSE POSS.; STATUTE OF LIMITATIONS.

PROSPECTING CONTRACT.

1. *Prospecting contract—Tenants in common.*—G. and McB. agreed verbally to prospect for quartz, and to share equally in claims taken up. McB. discovered and located a claim in the name of G. and others. *Held*, that G. had a good title by appropriation; that the agreement need not be in writing; that the appropriation made by McB. for G. was equally valid as if made by himself; indeed G.'s consent would be presumed, the act being for his benefit, and a subsequent cancellation of G.'s name in the notice of appropriation without his consent would not defeat his title. *Held*, that G. and McB. were tenants in common. *Gore v. McBrayer*, 645

QUO WARRANTO.

1. *Motion.*—A court of equity can not remove the ministerial officers of a corporation. *Neall v. Hill*, 80

RECEIVER.

1. *Receiver preferable to injunction.*—The appointment of a receiver is to be preferred to the alternative of enjoining mining operations. To stop the working of a mine is alike opposed to public policy, and to the private justice due to the party who may be found ultimately to be the owner. *Deep River Co. v. Fox* 296

RECORD.

1. *Record of location—Description.*—A record is not required by the U. S. Mining Acts, but may be by local law. And if required by local law, it must contain an accurate description, and fix the *locus* of the claim by reference to natural objects or permanent monuments. *Golden Fleece Co. v. Cable Co.*, 120

RELATION—See DITCH, 1, 2.

RELOCATION.

1. *Relocation of abandoned claim by co-tenant.*—In May, 1858, the plaintiff and nine others located ten claims. In February, 1859, seven of the original locators with three strangers relocated; the names of plaintiff and two others of the original locators being united, and the names of strangers substituted. In 1861, a new district rule required the record of every claim to be renewed by a date certain, or be considered abandoned. For about two years neither party renewed their record, but after such period, and after the penalty of abandonment had become affixed to the claims, a renewal record was made by those claiming under the record of 1859, or by some of them with strangers. *Held*, that the location of 1858 was abandoned, without regard to whether the record of 1859 was valid or invalid as against the parties omitted. (2). That the title was in those who made the third or renewal record, and (3). That as to abandoned claims the previous relation of co-tenancy would not prevent some relocating for their own benefit without regard to the claims of others who had been their co-tenants. *Strang v. Ryan*, 48

2. *Relocation by drift from adjoining claim.*—A relocator must sink the original discovery shaft ten feet deeper, or make an entirely new opening by shaft, drift, adit or tunnel; it is not enough that he has run a drift into the claim from the bottom of a shaft on an adjoining claim. *Little Gunnel Co. v. Kimber*, 536

3. *Premature relocation.*—A location made upon a mining claim before the owner has failed to do the annual labor is a mere nullity, and his continued failure so to do will not make such a location valid. The claim is not subject to relocation until the owner is in default. *Slavonian Co. v. Perasich*, 541

4. *Relocation before forfeiture.*—The relocation of a mining claim before the same is forfeited by failure to do the annual labor is void, and a subsequent failure to do the annual labor by the original locators, will not revive the void location. *Belk v. Meagher*, 522

5. *Relocation before forfeiture.*—A relocation of a mining claim, prior to the time when it is forfeited by failure to do the annual labor, is void; nor does it become validated by the failure of the original locator to do the work within the required period. *Belk v. Meagher*, 510

6. *Relocation by third parties.*—A relocation by third parties made peaceably, after the time for annual labor had expired, is paramount to a relocation made before such period had elapsed, as well as against the original title. *Id.*

See AGENT, 3; ANNUAL LABOR, 3.

SEAL—See CONVEYANCE, 5.

SEVERANCE—See ADVERSE Poss., 19-22.

SIDE LINES.

1. *Side lines.*—A vein can not be followed beyond the adopted side lines. *Golden Fleece Co. v. Cable Co.*, 120

SLAG—See ABANDONMENT, 23.

STATUTE OF LIMITATIONS.

1. *Prescription.*—To acquire title by prescription, it is necessary that the period of enjoyment should equal the time fixed by the statute of limitations as a bar to an entry on land, which in California is five years. *Crandall v. Woods*, 604

2. *Tax title defeated by.*—Between the tax title claimant and the original owner, the latter will be regarded as the true owner, notwithstanding any technical defects which may be found to his title, and he may bar the right asserted by the tax title claimant by showing an actual occupation and use of the premises under his title for any considerable portion of the three years required to perfect a title. *Wilson v. Henry*, 152

3. *Statute of limitations.*—The benefits of the statute of limitations may be secured without a special plea by defendants, when the complaint is silent as to the foundation of the right sought to be enforced. *Gottschall v. Melsing*, 667

See ABANDONMENT, 20; ACCOUNT, 10; ADVERSE POSSESSION; PRESCRIPTION.

STOCK.

1. *Specific performance.*—Each of the shares of stock of a mining company being of equal value, a court of equity will not decree a transfer to plaintiff of the particular shares sued for. *Hardenbergh v. Bacon*, 352

See AGENT, 47.

TAILINGS—See ABANDONMENT, 26.

TAX—See ALIENS, 6-8.

TENANT IN COMMON.

1. *Tenants in common—Possession of one—Delinquent partner.*—The possession of one tenant in common inures to the benefit of all, until such possession becomes adverse.

Obiter. If one partner or tenant in common, having become associated with his copartners in the development of a claim, voluntarily leaves it in possession of his copartners and refuses to bear his just proportion of expense, and afterward brings his action to recover his interest, equity would, upon a proper showing, stay his relief until he had paid his full proportion of expense. *Mallett v. Uncle Sam Co.*, 18

2. *Possession of tenants in common, inter se.*—The possession of one tenant in common is possession for all, but this rule does not apply where one tenant claims to hold adversely to the others. *Partridge v. McKinney*, 185

See ADVERSE POSSESSION, 16, 17; PARTNERSHIP, 2, 3; PLEADING AND PRACTICE, 17.

TITLE BOND.

1. *Only an option till accepted.*—A title bond executed by the owner of the property only, gives to the obligee an option to purchase; but not being a mutual obligation binding upon both contracting parties, is enforceable only by acceptance and performance of its conditions during the continuance of the option. *Finerty v. Fritz*, 438

TOWN SITE.

1. *Town lots on mineral lands.*—A person can not, under the pretense of a town lot, locate and hold a large tract of mining land in the mineral region of this State, as against persons who enter in good faith for the purpose of digging gold therein. *Martin v. Browner*, 613

TRUST.—See ADVERSE POSSESSION, 16; AGENT, 25; CORPORATION, 1.

WARRANTY.

1. *A general warranty* is a real covenant descending with the land, and passing to assigns by its express terms. *Susquehanna Co. v. Quick*, 202

WATER.

1. *Water—Mining and milling purposes.*—The appropriation of water for all purposes stands upon equal footing, and a later appropriation for mining purposes is not good against a prior appropriation by a mill. *McDonald v. Bear River Co.*, 626
2. *Damage for diversion.*—A verdict for damages in an action at law for diversion of water, does not establish the quantity of water to which the plaintiffs are entitled, nor is it to be presumed that the whole number of inches claimed in their complaint was proved to and found by the jury; and the averment of such former recovery is not of itself sufficient to support an injunction against further diversion. *McDonald v. Bear River Co.*, 639
3. *What will constitute invasion of water rights.*—What diminution of quantity or deterioration in quality will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case; and in controversies between him and parties subsequently claiming the water, the question for determination is, whether his use and enjoyment of the water, to the extent of the original appropriation, have been impaired by the acts of the other parties. *Atchison v. Peterson*, 583
4. *Sale—Previous right of action.*—The conveyance of a water claim does not transfer the right of action for damages for the past illegal use of the water. *Kimball v. Gearhart*, 615
5. *Water returned.*—Where water is taken at a point above the plaintiff's ditch, and after being used, is returned so that it reaches plaintiff's ditch without material diminution in quantity or quality, plaintiff has no cause of action. *Yankee Jim's Co. v. Crary*, 196
6. *Division of water by alternate use.*—If the first appropriator of the waters of a stream only appropriates a part, another person may appropriate the residue; or one may appropriate for certain days or months,

WATER. *Continued.*

and another for other specified times. There is no difference in principle between appropriations of water, measured by time and those measured by volume. *Smith v. O'Hara*, 671

7. *Water rights excluded in patent.*—Where patent issues reserving the water rights mentioned in § 2339, U. S. Revised Statutes, the claimant of such rights continues to own them; but his right may become divested by abandonment. *Dodge v. Marden*, 63

See ABANDONMENT, 26; APPROPRIATION; DITCHES; EVIDENCE, 1.

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